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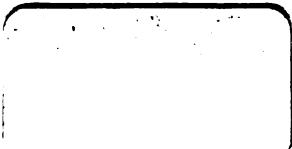
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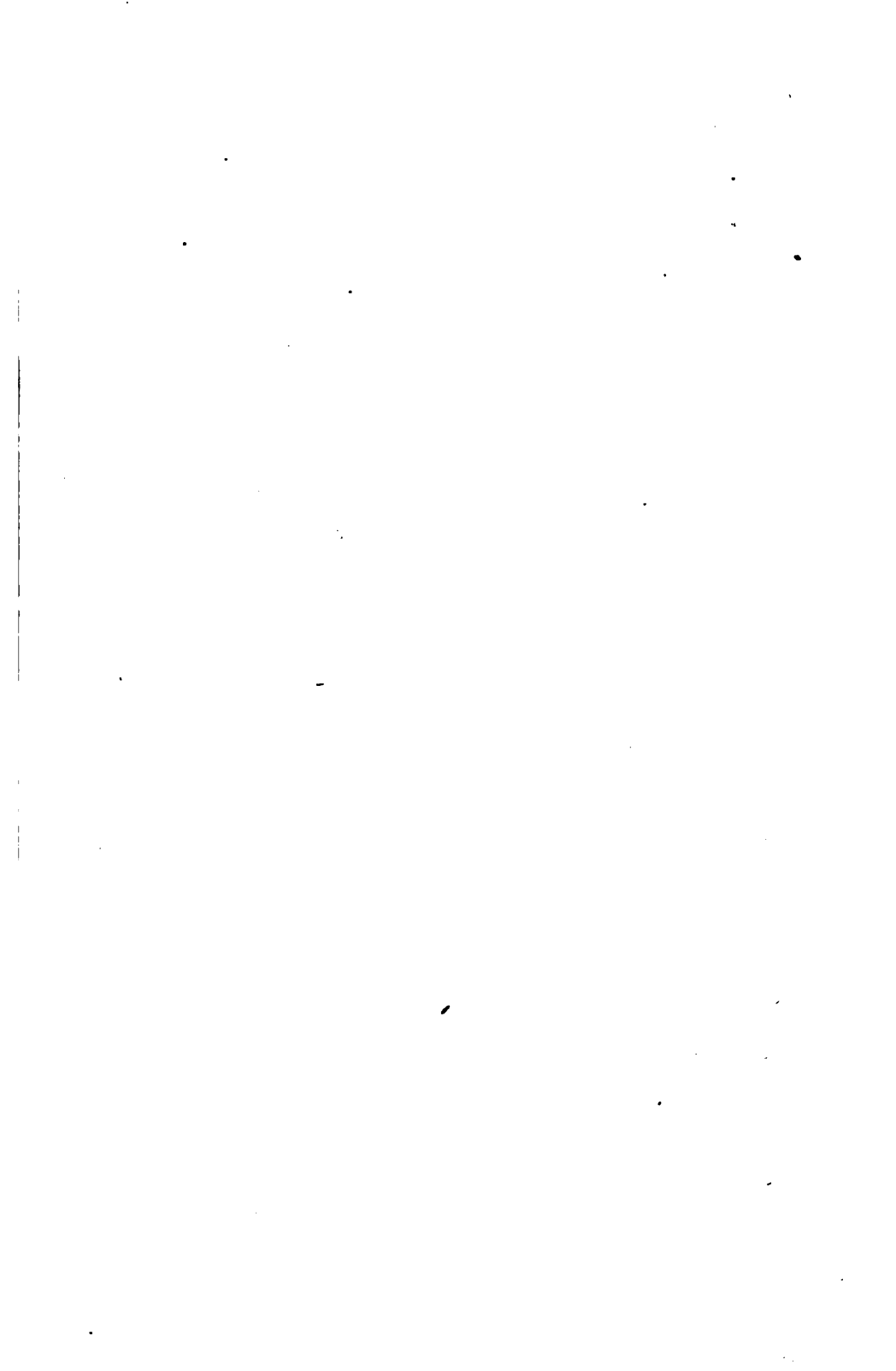


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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND CONSTRUED, AN
INDEX, AND NOTES TO THE REPORTED CASES.

◦ **PHILIP ZOERCHER,**
OFFICIAL REPORTER
NORMAN E. PATRICK, Assistant Reporter

VOL. 59

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1914, NOT
REPORTED IN VOLUMES 57 AND 58, AND AT THE MAY TERM, 1915.

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME.

HON. JOSEPH H. SHEA.*§
HON. JOSEPH G. IBACH.**¶
HON. FRED S. CALDWELL.††
HON. EDWARD W. FELT.¶
HON. JAMES J. MORAN.††
HON. MILTON B. HOTTEL.¶
HON. MOSES B. LAIRY.††

*Chief Justice at November Term, 1914, and May Term, 1915.

**Presiding Judge at May Term, 1915.

†Presiding Judge at November Term, 1914.

¶Elected in 1910, reelected in 1914.

§Elected in 1912.

†Appointed September 1, 1913, and elected in 1914.

††Appointed February 10, 1915.

††Elected in 1910.

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CASES REPORTED

A

Acton v. Baltimore, etc., R. Co.	280
Adams Express Co. v. Welborn	330
A. J. Barrett Co., Rader v. . . .	27
Almy v. Commercial, etc., Assn.	249
American, etc., Tin Plate Co. v. Yonan.....	700
American Maize Products Co., Forsyth v.....	634
American Nat. Bank, McConnell v.....	319

B

Baldwin, Ripley v.....	77
Ballard, Princeton Light, etc., Co. v.....	345
Baltimore, etc., R. Co., Acton v.....	280
Bebout, Johnson v.....	159
Blair Baker Horse Co. v. Railroad Transfer Co.....	505
Bland, Vandalia Coal Co. v.....	308
Bledsoe v. Ross.....	609
Board, etc. v. Johnson.....	112
Boes v. Grand Rapids, etc., R. Co.....	271
Bretz, Ferdinand R. Co. v.....	123
Britz, Geissler Shoe Co. v.....	706
Bronnenberg v. Indiana Union Traction Co.....	495
Brooks, Indianapolis Outfitting Co. v.....	79
Brumbaugh, Rock Oil Co. v.....	640
Buck v. Koontz.....	706
Buffalo Specialty Co. v. Indiana, etc., Wire Co.....	465
Burk, Deeter v.....	449

C

Carr, Zimmerman v.....	245
Cauldwell, Indiana Union Traction Co. v.....	513
Chicago, etc., R. Co. v. Collins.....	572
— v. Leiter.....	212
— v. Roth.....	161
Citizens Nat. Bank v. Kerney ..	96

City of Attica, Isley v.....	694
City of East Chicago v. Gilbert.....	613
City of Gary v. Giesel.....	565
City of Jeffersonville v. Louisville, etc., Traction Co.....	237
Cleveland, etc., R. Co., Lutz v.....	16
—, Town of Newpoint v.....	147
— v. Means.....	383
Clevenger v. Clevenger.....	13
Cline, Ervin v.....	242
Olymer v. State, ex rel.....	364
Collins, Chicago, etc., R. Co. v.....	572
Commercial, etc., Assn., Almy v.....	249
Coombes, Public Savings Ins. Co. v.....	523
Cowan, Glendenning v.....	529
Cunningham, Intermediate Life, etc., Co. v.....	326
Curry, Vincennes Traction Co. v.....	683

D

Daegling v. Strauss.....	672
Deal v. Plass.....	185
Deeter v. Burk.....	449
Doran, Kokomo Brass Works v.....	583

E

Beckhart v. Marion, etc., Traction Co.....	217
Elder v. Erie Canal Coal Co.....	598
Erie Canal Coal Co., Elder v.....	598
Ervin v. Cline.....	242
Ervington, Pittsburgh, etc., R. Co. v.....	371

F

Farabee v. Warren.....	81
Farmer, Lamar v.....	501
Fender v. Phillips.....	85
Ferdinand R. Co. v. Bretz.....	123
First Nat. Bank, Parker v.....	189
—, Vermillion v.....	35
Fisher Gibson Co., McKinzie v.....	14

Forsyth v. American Maize Products Co.....	634
Frankel v. Voss.....	175
Frantz, Smith v.....	260

G

Geisel, City of Gary v.....	565
Geissler Shoe Co. v. Britz....	706
Gilbert, City of East Chicago v.....	613
Glendenning v. Cowan.....	529
Grand Rapids, etc., R. Co., Boes v.....	271
Graves, Smith v.....	55
Greer-Wilkinson Lumber Co., Lagrange v.....	488

H

Hall, W. McMillen & Son v.....	545
Herkless, Julius Keller Con- struction Co. v.....	472
Hibben, Smith v.....	438
Hirsch, Nagle v.....	282
Hornaday, Terre Haute, etc., Traction Co. v.....	207
House, Vandalia R. Co. v.....	10
Hudson, O'Neill v.....	541
Hutchinson v. Wood.....	537

I

Indiana, etc., Wire Co., Buffa- lo Specialty Co. v.....	465
Indiana Union Traction Co., Bronnenberg v.....	495
— v. Cauldwell.....	513
Indianapolis Outfitting Co. v. Brooks.....	79
Intermediate Life, etc., Co. v. Cunningham.....	326
Isley v. City of Attica.....	694

J

Jeffersonville School Tp. v. School City, etc.....	83
Johnson v. Bebout.....	159
—, Board, etc. v.....	112
— v. Sidey.....	678
Joliff, Muncie Electric Light Co. v.....	349
Julius Keller Constr. Co. v. Herkless.....	472

K

Karch, Lamphier v.....	661
Kerney, Citizens Nat. Bank v.	96

Kester, Wilson v.....	471
Klitzke v. Smith.....	461
Koenig, Maffenbeier v.....	518
Kokomo Brass Works v. Doran.....	583
Koontz, Buck v.....	706

L

Lagrange v. Greer-Wilkinson Lumber Co.....	488
Lamar v. Farmer.....	501
Lamphier v. Karch.....	661
Latham, Sovereign Camp, etc. v.....	290
Leiter, Chicago, etc., R. Co. v.	212
Little v. Mundell.....	227
Lottich, Louisville, etc., Trac- tion Co. v.....	426
Louisville, etc., Traction Co., City of Jeffersonville v.....	237
— v. Lottich.....	426
Lutz v. Cleveland, etc., R. Co.	16

M

McClain v. Steele.....	657
McConnell v. American Nat. Bank.....	319
McKinzie v. Fisher Gibson Co.....	14
Macy, Pittsburgh, etc., R. Co. v.....	125
Maffenbeier v. Koenig.....	518
Marlon, etc., Traction Co., Eckhart v.....	217
Means, Cleveland, etc., R. Co. v.....	383
Metropolitan Life Ins. Co. v. Stenger.....	606
Miller, Picken v.....	115
— v. Ready.....	195
Modern Woodmen, etc. v. Young.....	1
Muncie Electric Light Co. v. Joliff.....	349
Mundell, Little v.....	227

N

Nagle v. Hirsch.....	282
National, etc., Ins. Co. v. Wolfe.....	418
New Amsterdam Casualty Co. v. New Palestine Bank....	69
New Palestine Bank, New Amsterdam Casualty Co. v.	69

O

O'Neil v. Hudson.....541

P

Parker v. First Nat. Bank...189
Phillips, Fender v.....85
Picken v. Miller.....115
Pittsburgh, etc., R. Co. v.
Ervington.....371
— v. Macy.....125
Plass, Deal v.....185
Princeton Light, etc., Co. v.
Ballard.....345
Public Savings Ins. Co. v.
Coombes.....523

R

Rader v. A. J. Barrett Co.... 27
Railroad Transfer Co., Blair
Baker Horse Co. v.....505
Ready, Miller v.....195
Reichard, State, ex rel. v....338
Ripley v. Baldwin..... 77
Rock Oil Co. v. Brumbaugh..640
Ross, Bledsoe v.....609
Roth, Chicago, etc., R. Co. v.161

S

School City, etc., Jefferson-
ville School Tp. v..... 83
Sidey, Johnson v.....678
Smith v. Frantz.....260
— v. Graves..... 55
— v. Hibben.....438
—, Klitzke v.....461
— v. Smith.....169
Souers v. Stahl.....543
Sovereign Camp, etc., v. Lath-
am.....290
Stahl, Souers v.....543

State, ex rel., Clymer v.....364
— v. Reichard.....338
Steele, McClain v.....657
Stenger, Metropolitan Life
Ins. Co. v.....606
Strauss, Daegling v.....672

T

Terre Haute, etc., Traction
Co. v. Hornaday.....207
Town of Newpoint v. Cleve-
land, etc., R. Co.....147

V

Vandalla Coal Co. v. Bland..308
— v. House..... 10
Vermillion v. First Nat. Bank 35
Vincennes Traction Co. v.
Curry.....683
Voss, Frankel v.....175

W

Warren, Farabee v..... 81
Welborn, Adams Express Co.
v.....330
Wilson v. Kester.....471
W. McMillen & Son v. Hall..545
Wolfe, National, etc., Ins. Co.
v.....418
Wood, Hutchinson v.....537

Y

Yonan, American, etc., Tin
Plate Co. v.....700
Young, Modern Woodmen,
etc. v..... 1

Z

Zimmerman v. Carr.....245

CASES CITED

Abbott v. Union Mut. Life Ins. Co., 127 Ind. 70.....	540	Antioch Coal Co. v. Rockey, 169 Ind. 247.....	134
Abshire v. Williamson, 149 Ind. 248.....	445, 447	Arkansas, etc., Cattle Co. v. Mann, 130 U. S. 69....	511, 633
Adams v. Antles, 57 Ind. App. 594.....	559	Armstrong v. Hufty, 156 Ind. 606.....	169, 181
— v. Buhler, 116 Ind. 100..	30	Arthur v. Cumming, 91 U. S. 362.....	604
— v. Harrington, 114 Ind. 66.....	544	Ashley v. Henderson, 32 Ind. App. 242.....	447
— v. Roscoe Lumber Co., 159 N. Y. 176.....	456	Ashton v. Shepherd, 120 Ind. 69.....	436
Adams Express Co. v. Byers, 177 Ind. 33.....	336	Aspy v. Lewis, 152 Ind. 493..	173
— v. Carnahan, 29 Ind. App. 606.....	336	Atchison, etc., R. Co. v. Robinson, 233 U. S. 173.....	335
— v. Croninger, 226 U. S. 491.....	334	— v. Smith, 28 Kan. 541..	397
Advisory Board v. State, ex rel., 164 Ind. 295.....	535	Atlas Engine Works v. First Nat. Bank, 50 Ind. App. 549.....	104
Aetna Ins. Co. v. Baker, 71 Ind. 102.....	342	Attorney-General v. Metropolitan R. Co., 125 Mass. 515..	360
Aetna Life Ins. Co. v. Stryker, 42 Ind. App. 57.....	184	Avery v. Nordyke & Marmon Co., 34 Ind. App. 541.....	316
Alabama, etc., R. Co. v. Guest, 144 Ala. 373.....	397		
Alexander v. Spaulding, 160 Ind. 176.....	341	Baker v. Bundy, 55 Ind. App. 272.....	454
Alexandria Mining, etc., Co. v. Painter, 1 Ind. App. 587....	61	— v. Osborne, 55 Ind. App. 518.....	179
Alkire v. Alkire, 134 Ind. 350.	341	— v. Pyatt, 108 Ind. 61....	470
Allen v. Hollingshead, 155 Ind. 178.....	358	Baldwin v. Pennsylvania Fire Ins. Co., 206 Pa. St. 248...	75
— v. Mayfield, 20 Ind. 293..	174	— v. Sutton, 148 Ind. 591..	221
— v. United States, 164 U. S. 492.....	121	Ballew v. City of St. Joseph, 163 Mo. App. 297.....	624
Alsop v. Banks, 68 Miss. 664.....	202, 206	Baltes v. Bass, etc., Mach. Works, 129 Ind. 185....	59, 60
American Bonding Co. v. Hall, 57 Ind. App. 523.....	370	Baltimore, etc., R. Co. v. Kelser, 51 Ind. App. 58....	135
American Cent. Ins. Co. v. Sweetser, 116 Ind. 370....	92	— v. Kleesples, 39 Ind. App. 161.....	561
American Cent. Life Ins. Co. v. Rosenstein, 46 Ind. App. 537.....	5	— v. Musgrave, 24 Ind. App. 295.....	377
American, etc., Tin Plate Co. v. Bucy, 43 Ind. App. 501..	480	— v. Rosborough, 40 Ind. App. 14.....	382
American Express Co. v. Patterson, 73 Ind. 430.....	59	— v. Slaughter, 167 Ind. 330.....	591
American Fidelity Co. v. Indianapolis, etc., Fuel Co., 178 Ind. 133.....	158	— v. Town of Whiting, 161 Ind. 228.....	138
Aneshaensel v. Twyman, 42 Ind. App. 354.....	174	Bane v. Keefer, 152 Ind. 544.	453
		Bank v. Collector, 70 U. S. 495.....	362

Barnard v. Heydrick, 49 Barb. 62.....	275	Bloom v. Franklin Life Ins. Co., 97 Ind. 478.....	7
Barnes v. Wagener, 169 Ind. 511.....	58, 542	Board, etc. v. Allman, 142 Ind. 573.....	666, 669
Barnett v. State, 177 Ind. 461.	312	— v. Center Tp., 107 Ind. 584.....	114
Barnhart v. Cissna, 42 Ind. 477.....	542	— v. Pearson, 120 Ind. 426.	61
Barr v. Auburn, 89 Ill. 361..	142	— v. State, ex rel., 179 Ind. 644.....	332, 532
Barrett v. Johnson, 2 Ind. App. 25.....	156	Boes v. Grand Rapids, etc., R. Co., 59 Ind. App. 271.....	281
— v. Southern Pac. Co., 91 Cal. 296.....	402	Bolling v. Miller, 133 Ind. 602.	174
— v. State, 175 Ind. 112...	603	Bond v. Coats, 16 Ind. 202..	194
Barry v. New York Cent. R. Co., 92 N. Y. 289.....	394, 404	Boomer v. Wilbur, 176 Mass. 482.....	488
Bates v. Horner, 22 L. R. A. 824, note.....	662	Boos v. Morgan, 130 Ind. 305.	494
Beach v. Sterling Iron, etc., Co., 54 N. J. Eq. 65.....	653	Borgnis v. Falk Co., 147 Wis. 327.....	590
Beatty v. Irwin, 35 Ind. App. 238.....	286	Bosley v. Susquehanna Canal Co., 3 Bland (Md.) 63.....	355
Beavers v. Bess, 58 Ind. App. 287.....	179	Bouwmeester v. Grand Rapids, etc., R. Co., 67 Mich. 87.....	397
Beck v. Carter, 68 N. Y. 283.	404	Bowen v. Roach, 78 Ind. 361.	270
Bell v. State, 81 Ark. 16.....	121	Bowers v. Fleming, 67 Ind. 541.....	342
Benjamin v. Tillman, 3 Fed. Cas. 190.....	460	Bowling Coal Co. v. Ruffner, 117 Tenn. 180.....	653
Bennett v. Closson, 138 Ind. 542.....	183	Bradford v. School Town of Marion, 107 Ind. 280.....	183
— v. Needham, 83 Ind. 566.	564	— v. Wegg, 56 Ind. App. 39.	125
— v. Root Furniture Co., 176 Ind. 606.....	311	Bradley Timber Co. v. White, 121 Fed. 779.....	456
Benson v. City of Madison, 101 Wis. 312.....	620	Brandenburg v. Seigfried, 75 Ind. 568.....	356
Berger v. Minneapolis Gas Light Co., 60 Minn. 296....	653	Brandt v. State, ex rel., 171 Ind. 288.....	535
Beshore v. Lytle, 114 Ind. 8.....	287, 289	Brannen v. Kokomo, etc., Gravel Road Co., 115 Ind. 115.....	571
Bessler v. Laughlin, 168 Ind. 38.....	559, 595	Branson v. Caruthers, 49 Cal. 374.....	459
Beuttell v. Magone, 157 U. S. 154.....	456	Brennan Constr. Co. v. Cumberland, 29 App. Cas. (D. C.) 554.....	653
Birke v. Abbott, 103 Ind. 1..	493	Bristow v. Garriger, 24 Okla. 324.....	270
Bishop v. Ross, 56 Ind. App. 610.....	274	Brokaw v. City of Terre Haute, 97 Ind. 451.....	697
Blackstone v. Standard Life, etc., Co., 3 L. R. A. 486, note.....	8	Brooks v. Allen, 62 Ind. 401..	458
Blair v. Whittaker, 31 Ind. App. 664.....	300	— v. Kunkle, 24 Ind. App. 624.....	502
Blair Baker Horse Co. v. Railroad Transfer Co., 59 Ind. App. 505.....	278	— v. Muncie, etc., R. Co., 176 Ind. 298.....	516
Blankenship v. King County, 68 Wash. 84.....	627	Brotherhood, etc. v. Moore, 36 Ind. App. 580.....	302
Bliss & Wood v. Couch, 46 Kan. 400.....	50	Brown v. American Steel, etc., Co., 43 Ind. App. 560..	472, 557
Block v. State, 100 Ind. 357..	520		

- Brown v. Brown**, 168 Ind. 654
445, 448
 — v. Butchers, etc., Bank,
 6 Hill (N. Y.) 443.....275
 — v. Dicus, 172 Ind. 51.....470
 — v. Maher, 68 Ind. 14....181
 — v. Young, 69 Iowa 625...355
Bruce v. Bissel, 119 Ind. 525.174
Bruff v. Illinois Cent. R. Co.,
 121 S. W. (Ky.) 475.....226
Bruner's Appeal, 57 Pa. St.
 46.....93
Bruns v. Cope, 182 Ind. 280..276
Buchanan v. Logansport, etc.,
 R. Co., 71 Ind. 265.....158
Buchmeier v. City of Daven-
port, 138 Iowa 623....620, 624
Bunting v. Pennsylvania R.
Co., 118 Pa. St. 204.....691
Bunyan v. Reed, 34 Ind. App.
 295.....258, 259
Burdick v. Missouri Pac. R.
Co., 123 Mo. 221.....633
Burford v. Dautrich, 55 Ind.
 App. 384.....136
 — v. First Nat. Bank, 30
 Ind. App. 384.....44, 47
Burkam v. Ohio, etc., R. Co.,
 122 Ind. 344.....360
Burl v. American Tel., etc.,
Co., 224 Ill. 266.....363
Burns v. Fox, 113 Ind. 205...500
Burroughs v. Eastman, 101
 Mich. 419.....59
Burton v. Baxter, 7 Blackf.
 297.....323
 — v. United States, 196 U.
 S. 283.....123
Bush v. Seaton, 4 Ind. 522...458
Butcher v. Greene, 50 Ind.
 App. 692.....502, 503
Butler v. Edgerton, 15 Ind. 15.265
Butler University v. Conard,
 94 Ind. 353.....183
Byrne v. New York, etc., R.
Co., 104 N. Y. 362.....394

Cabot v. Kingman, 166 Mass.
 403.....488
Cahill v. Eastman, 18 Minn.
 324.....653
Cal Hirsch & Sons, etc., Co.
 v. Peru Steel, etc., Co., 50
 Ind. App. 59.....312
Campbell v. Bradford, 166
 Ind. 451.....174
 — v. Faxon, 5 L. R. A. (N.
 S.) 1002, note.....202

Campbell v. Indianapolis, etc.,
Traction Co., 39 Ind. App.
 66.....216
Cambridge Lodge, etc., v.
Routh, 163 Ind. 1.....183
Cannon v. Cleveland, etc., R.
Co., 157 Ind. 682.....392, 406
Capitol Nat. Bank v. Holmes,
 43 Colo. 154.....494
Carey v. Hess, 112 Ind. 398..104
Carleton v. Franconia Iron,
etc., Co., 99 Mass. 216....392
Carmel Nat. Gas, etc., Co. v.
Small, 150 Ind. 427.....535
Carmichael v. Shiel, 21 Ind.
 66.....511
Carmine v. Bowen, 104 Md.
 198.....270
Carmody v. State, 178 Ind.
 158.....312
Carnwright v. Gray, 127 N.
 Y. 92.....460
Carr v. Ashland, 62 N. H. 605.622
 — v. Eel River, etc., R. Co.,
 21 L. R. A. (N. S.) 354,
 note.....580
Carson v. City of Hastings,
 81 Neb. 681.....620
Carver v. Carver, 97 Ind. 497.456
Casement & Co. v. Brown, 143
 U. S. 615.....483
Cassida v. Oregon R., etc.,
Co., 14 Or. 551.....397
Catholic Order, etc. v. Col-
lins, 51 Ind. App. 285.....295
Caywood v. Supreme Lodge,
etc., 171 Ind. 410.....304
Central Passenger R. Co. v.
Kuhn, 86 Ky. 578.....691
Charles v. Byrd, 29 S. C. 544.204
Chase v. Van Meter, 140 Ind.
 321.....493
Cheney v. Libby, 134 U. S. 68. 500
Chesapeake, etc., R. Co. v.
Rogers, 100 Va. 324.....397
Chicago, etc., R. Co. v. Barker,
 169 Ind. 670.....221
 — v. Coon, 48 Ind. App. 675
134, 169
 — v. Dinius, 180 Ind. 596
125, 158, 515, 630, 703
 — v. Fox, 38 Ind. App. 268.402
 — v. Fretz, 173 Ind. 519
138, 139, 146, 571
 — v. Glover, 154 Ind. 584..480
 — v. Hamerick, 50 Ind. App.
 425.....135, 146
 — v. Huncheon, 130 Ind. 529
355

Chicago, etc., R. Co. v. Katzenbach, 118 Ind. 174.....	92	City of Evansville v. Frazier, 24 Ind. App. 628.....	628
— v. Krayenbuhl, 65 Neb. 889.....	407	— v. Pifer, 51 Ind. App. 646.....	619
— v. Lain, 170 Ind. 84.....	648	— v. Senhenn, 151 Ind. 42.....	169, 486
— v. Martin, 31 Ind. App. 308.....	315, 392	— v. Wilter, 86 Ind. 414.....	628
— v. Mitchell, 56 Ind. App. 351.....	562	City of Fort Wayne v. Bender, 57 Ind. App. 689.....	622
— v. Nash, 1 Ind. App. 298.....	215	— v. Christie, 156 Ind. 172.....	316, 317
— v. Parks, 18 Ill. 460.....	212	— v. De Witt, 47 Ind. 391.....	619
— v. Richards, 28 Ind. App. 46.....	453	City of Frankfort v. Coleman, 19 Ind. App. 368.....	626
— v. Turner, 33 Ind. App. 264.....	25	City of Huntington v. Lusch, 33 Ind. App. 476.....	619
— v. Vester, 47 Ind. App. 141.....	603	— v. Mendenhall, 73 Ind. 400.....	435
— v. Wysor Land Co., 163 Ind. 288.....	158	— v. Mitten, 176 Ind. 485.....	703
Chitty v. St. Louis, etc., R. Co., 148 Mo. 64.....	633	City of Indianapolis v. Huffer, 30 Ind. 235.....	564
— v. —, 106 Mo. 435.....	633	— v. Marold, 25 Ind. App. 428.....	486
Cincinnati, etc., R. Co. v. Acrea, 40 Ind. App. 150.....	690	— v. Slider, 56 Ind. App. 230.....	629
— v. Armuth, 180 Ind. 673.....	160, 167, 650	— v. Woessner, 54 Ind. App. 552.....	140
— v. Geisel, 119 Ind. 77.....	355	City of Lebanon v. Twiford, 13 Ind. App. 384.....	653
— v. Lang, 118 Ind. 579.....	554	City of Lincoln v. Pirner, 59 Neb. 634.....	624
— v. Spera, 36 Ind. App. 315.....	32, 188	City of Linton v. Smith, 31 Ind. App. 546.....	619
— v. Worthington, 30 Ind. App. 663.....	431, 561	City of Logansport v. Dick, 70 Ind. 65.....	482, 486, 487
City Council, etc. v. Ryan, 22 S. C. 339.....	324	— v. Newby, 49 Ind. App. 674.....	124
City of Anderson v. Fleming 160 Ind. 597.....	480	— v. Smith, 47 Ind. App. 64.....	569, 690
City of Aurora v. Fox, 78 Ind. 7.....	241	City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1.....	157
— v. West, 9 Ind. 74.....	360, 361	City of Pueblo v. Babbitt, 47 Colo. 596.....	624
City of Bloomington v. Citizens Nat. Bank, 56 Ind. App. 446.....	509	City of Richmond v. Sitterding, 101 Va. 354.....	483
— v. Wilson, 14 Ind. App. 476.....	487	City of Rushville v. Morrow, 54 Ind. App. 538.....	621
City of Bluffton v. McAfee, 23 Ind. App. 112.....	629	City of South Bend v. Turner, 156 Ind. 418.....	487
City of Chicago v. Robbins, 2 Black 418.....	484	City of Valparaiso v. Chester, 176 Ind. 636.....	619
City of Crawfordsville v. Braden, 130 Ind. 149.....	241	— v. Moffitt, 12 Ind. App. 250.....	59
City of Delphi v. Hamling, 172 Ind. 645.....	341	— v. Schwerdt, 40 Ind. App. 608.....	629
City of Detroit v. Detroit United Railway, 133 Mich. 608.....	241	City of Vincennes v. Thuis, 28 Ind. App. 523.....	571
City of Elkhart v. Witman, 122 Ind. 538.....	626		
City of Evansville v. Behme, 49 Ind. App. 448.....	618		

City of Williamsport v. Commonwealth, 84 Pa. St. 487..	241	Cole v. Franks, 147 Ind. 281	.....	446, 447
Clark v. Huey, 12 Ind. App. 224.....	32	Colglazier v. Town of Salem, 61 Ind. 445.....	193	
Clay v. Pittsburgh, etc., R. Co., 164 Ind. 439.....	12	Collins v. Catholic Order, etc., 43 Ind. App. 549.....	454	
Clem v. State, 42 Ind. 420.....	123	Combs v. Combs, 56 Ind. App. 656.....	477	
Cleveland, etc., R. Co. v. Beckett, 11 Ind. App. 547	.....	Comer v. State, 62 Ala. 320.....	363	
.....	510, 632	Commercial Life Ins. Co. v. Schroyer, 176 Ind. 654.....	5	
— v. Berry, 152 Ind. 607.....	558	Commonwealth v. Tuey, 62 Mass. 1.....	121	
— v. Blind, 182 Ind. 398.....	335	Comstock v. Village of Schuylerville, 139 App. Div. 378.....	624	
— v. Bowen, 179 Ind. 142	.....	Conboy v. Railway, etc., Accident Assn., 17 Ind. App. 62.	8	
.....	160, 646	Cones v. Board, etc., 137 Ind. 404.....	669	
— v. Case, 174 Ind. 369.....	166	Consolidated Stone Co. v. Summit, 152 Ind. 297.....	23, 316, 317	
— v. Christie, 178 Ind. 691.....	379	.....	23, 316, 317	
— v. Clark, 51 Ind. App. 392	.....	— v. Williams, 26 Ind. App. 131.....	564	
....164, 558, 562, 569, 647, 652	690, 692	Consumers Gas Trust Co. v. Littler, 162 Ind. 320.....	201	
— v. Dixon, 51 Ind. App. 658.....	67	Continental Ins. Co. v. Gue, 51 Ind. App. 232.....	447	
— v. Federle, 50 Ind. App. 147.....	23	— v. Vanlue, 126 Ind. 410.....	526	
— v. Hadley, 170 Ind. 204.....	168	Continental Life Ins. Co. v. Houser, 89 Ind. 258.....	7	
— v. Hayes, 181 Ind. 87	.....	— v. —, 111 Ind. 266.....	7	
.....	160, 336	Cook v. Ormsby, 45 Ind. App. 352.....	595	
— v. Huddleston, 21 Ind. App. 621.....	12	— v. Richardson, 178 Mass. 125.....	93	
— v. Jones, 51 Ind. App. 245.....	168	Copeland v. Summers, 138 Ind. 219.....	535	
— v. Joyce, 54 Ind. App. 658.....	200	Corby v. Hill, 4 C. B. (N. S.) 556.....	404	
— v. Lynn, 171 Ind. 589.....	25	Corey v. Springer, 138 Ind. 506.....	174, 288	
— v. Miles, 162 Ind. 646.....	25	Corrigan v. Union Sugar Refinery, 98 Mass. 577.....	404	
— v. Nichols, 52 Ind. App. 349.....	432	Courtney v. Courtney, 4 Ind. App. 221.....	95	
— v. Patterson, 37 Ind. App. 617.....	562	Covington, etc., Bridge Co. v. Steinbrock, 61 Ohio St. 215.....	486	
— v. Stephenson, 139 Ind. 641.....	392	Cox v. Bank of Westfield, 18 Ind. App. 248.....	140	
— v. Tartt, 64 Fed. 823.....	392	— v. Martin, 75 Miss. 229.....	201	
— v. Van Laningham, 52 Ind. App. 156.....	119	Craig v. Frazier, 127 Ind. 286.	31	
— v. Ward, 147 Ind. 256.....	465	Creamery, etc., Co. v. Hotsenpiller, 159 Ind. 99.....	693	
— v. Wynant, 100 Ind. 160.....	591	Crow v. Evans, 178 Ind. 661	.....	58, 676
Clifford v. Meyer, 6 Ind. App. 633.....	490	Crusoe v. Bugby, 3 Wils. 234.....	205	
Clore v. Smith, 45 Ind. App. 340.....	173			
Cloughessey v. Waterbury, 51 Conn. 405.....	624			
Cobb v. Taylor, 133 Ind. 605.....	544			
Coburn v. Stephens, 137 Ind. 683.....	189, 493, 494			
Coffey v. Myers, 84 Ind. 105.	65			
Colby v. Cedar Rapids Ins. Co., 66 Iowa 577.....	9			

Cummins v. City of Seymour, 79 Ind. 491.....241, 485	Dieckman v. Louisville, etc., Traction Co., 46 Ind. App. 11.....164, 647
— v. Pence, 174 Ind. 115.....665	Digan v. Mandel, 167 Ind. 586
Cunningham v. Baxley, 96 Ind. 367.....202	.....454, 456, 457, 458
Curtiss v. Teller, 157 App. Div. 804.....456	Dill v. Lawrence, 109 Ind. 564.....522
Darling v. Hines, 5 Ind. App. 319.....193	Dillon v. State, 48 Ind. App. 495.....312
Darrow v. Family Fund So- ciety, 6 L. R. A. 495, note. 8	Diven v. Johnson, 117 Ind. 512.....109
Daugherty v. Reveal, 54 Ind. App. 71.....80, 81	Doak v. Root & McBride Co., 26 Ind. App. 138.....445, 447
Davidson v. Bates, 111 Ind. 391.....288	Dobenspeck v. Armel, 11 Ind. 31.....511
— v. Koehler, 76 Ind. 398.174	Doepfner v. State, ex rel., 36 Ind. 111.....344
Davis v. Chicago, etc., R. Co., 58 Wis. 646.....397	Dolan v. State, 122 Ind. 141.522
— v. Mercer Lumber Co., 164 Ind. 413.....595	Domestic Block Coal Co. v. De Army, 179 Ind. 592....
— v. Montgomery, 123 Ind. 587.....140	30, 134, 155, 223, 317, 319, 649
Davis Coal Co. v. Polland, 158 Ind. 607.....316	Dooley v. Town of Sullivan, 112 Ind. 451.....618
Davis & Rankin, etc., Mfg. Co. v. Vice, 15 Ind. App. 117.....32	Douglas v. Indianapolis, etc., Traction Co., 37 Ind. App. 332.....61
Davison v. London, etc., Ins. Co., 189 Pa. St. 132.....9	Drake v. Lady Ensly Coal, etc., R. Co., 102 Ala. 501.....653
Day v. Worcester, etc., R. Co., 151 Mass. 302.....201	Driscoll v. Penrod, 176 Ind. 19.....435
Dayton, etc., Traction Co. v. Marshall, 36 Ind. App. 491.431	Dromgold v. Royal Neighbors, 261 Ill. 60.....302
Dean v. Carruth, 108 Mass. 242.....460	Dronberger v. Reid, 11 Ind. 420.....666
Deemer v. Knight, 55 Ind. App. 397.....357	Drummond v. Crane, 23 L. R. A. 707, note.....202
Decker v. Yohe, 179 Ind. 243.160	Dudley v. State, 40 Ind. App. 74.....480
Delaware, etc., Tel. Co. v. Fiske, 40 Ind. App. 348....689	Duetz v. Louisville, etc., Trac- tion Co., 46 Ind. App. 692.165
Dennis v. Louisville, etc., R. Co., 116 Ind. 42.....215	Dull v. Cleveland, etc., R. Co., 21 Ind. App. 571.....392
Denver v. Perkins, 50 Colo. 159.....622	Dunlap v. Knapp, 14 Ohio St. 64.....670
Depue v. Travelers Ins. Co., 166 Fed. 183.....76	Dunn v. State, ex rel., 163 Ind. 317.....470
De St. Romes v. Blanc, 20 La. Ann. 424.....324	Dunning v. Lake Erie, etc., R. Co., 33 Ind. App. 91.579, 581
Devore v. McDermitt, 47 Ind. 234.....511	Durham v. Musselman, 2 Blackf. 96.....407
Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290..559	Duzan v. Meyers, 30 Ind. App. 227.....318
Dice v. Irvin, 110 Ind. 561... 51	Dye v. State, 130 Ind. 87.... 65
Dickerson v. Northwestern Mut. Life Ins. Co., 200 Ill. 270.....8	East v. Amburn, 47 Ind. App. 530.....104
Diebold v. Sharp, 19 Ind. App. 474.....318, 319, 693	Edgington v. Burlington, etc., R. Co., 116 Iowa 410.....
	.....398, 403, 405, 407

- Edmonds v. Mounsey, 15 Ind. App. 399.....204
 Eel River R. Co. v. State, ex rel., 143 Ind. 239.....179
 Egan v. Louisville, etc., Traction Co., 55 Ind. App. 423..559
 Elam v. City of Mt. Sterling, 20 L. R. A. (N. S.) 512, note.....624
 Elgin Dairy Co. v. Shepherd, 183 Ind. 466.....120
 Elliott v. Frakes, 71 Ind. 412..540
 Emery v. Vinall, 26 Me. 295..459
 Emison v. Shepard, 121 Ind. 184.....328
 Eppert v. Hall, 133 Ind. 417. 66
 Equitable Life Assur. Soc. v. Perkins, 41 Ind. App. 183. 75
 Erie R. Co. v. Swiderski, 197 Fed. 521.....397
 Ervin v. State, ex rel., 150 Ind. 332.....590
 Evans v. Adams Express Co., 122 Ind. 362.....393
 — v. Southern Turnpike Co., 18 Ind. 101.....143
 Evansville, etc., R. Co. v. Allen, 34 Ind. App. 636...570
 — v. Berndt, 172 Ind. 697378, 691
 — v. City of Evansville, 15 Ind. 395.....360, 361
 — v. Duncan, 28 Ind. 441579, 581
 — v. Griffin, 100 Ind. 221..393
 — v. Hoffman, 56 Ind. App. 530.....164
 — v. Krapf, 143 Ind. 647..164
 — v. McKinney, 34 Ind. App. 402.....335
 — v. State, ex rel., 149 Ind. 276.....379
 Evansville, etc., Traction Co. v. Broermann, 40 Ind. App. 47.....510, 632
 Evansville Gas, etc., Co. v. Robertson, 55 Ind. App. 353.689
 Evansville Hoop, etc., Co. v. Bailey, 43 Ind. App. 153557, 595
 Ewing v. Wilson, 132 Ind. 223.....109
 Fairbanks v. Warrum, 56 Ind. App. 337.....632
 Fall v. Hazelrigg, 45 Ind. 576.500
 Farmers Mut. Ins. Co. v. Home Fire Ins. Co., 54 Neb. 740..... 9
 Farmers Mut. Ins. Co. v. Jackman, 35 Ind. App. 1..301, 302
 Faris v. Hoberg, 134 Ind. 269.....392
 Farra v. Braman, 171 Ind. 529.....259
 Farrar v. Clark, 97 Ind. 447.540
 Fearons v. Kansas City, etc., R. Co., 180 Mo. 208.....397
 Federal Life Ins. Co. v. Kerr, 173 Ind. 613.....526
 Fee v. Moore, 74 Ind. 319...233
 Feller v. Gates, 40 Or. 543...344
 Felton v. Aubrey, 74 Fed. 350.397
 Fenwick v. Ratliff, 6 T. B. Mon. (Ky.) 154.....110
 Fletcher v. Martin, 126 Ind. 55.....45
 — v. Rylands, L. R. 1 Exch. *265.....651
 Flynn v. Chicago City R. Co., 250 Ill. 460.....571
 Flickeisen v. Wheeling Elec. Co., 67 W. Va. 335.....347
 Finch v. Travelers Ins. Co., 87 Ind. 302.....530
 Firemen's Fund Ins. Co. v. Finkelstein, 164 Ind. 376.. 82
 First Nat. Bank v. Dovetail Body, etc., Co., 143 Ind. 550.....45
 — v. New, 146 Ind. 411....43
 — v. Peck, 180 Ind. 649...511
 — v. Ransford, 55 Ind. App. 663.....501
 Fischer v. Holmes, 123 Ind. 525.....638
 Fisher v. Fisher, 113 Ind. 474.460
 — v. McGirr, 67 Mass. 1...362
 — v. Syfers, 109 Ind. 514...44
 Foland v. Town of Frankton, 142 Ind. 546.....536
 Foot v. Great Northern R. Co., 81 Minn. 493.....93
 Foote v. Foote, 53 Ind. App. 673.....542
 Forbes v. Union Ins. Co., 151 Ind. 89.....526
 Fort Wayne Cooperage Co. v. Page, 170 Ind. 585.....651
 Fort Wayne, etc., Traction Co. v. Crosble, 169 Ind. 281.....377
 — v. Monroeville, etc., Tel. Co., 179 Ind. 334.....479
 Foster v. City of Chicago, 197 Ill. 264.....483
 Fowler v. Duhme, 143 Ind. 248.....174

- Fowler v. Metropolitan Life Ins. Co., 116 N. Y. 389....526
 Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602....629
 Frankhouser v. Ellett, 22 Kan. 127.....51
 Frazer v. Boss, 66 Ind. 1....558
 Freese v. State, 159 Ind. 597. 65
 Friebe v. Elder, 181 Ind. 597.179
 Fudge v. Marquell, 164 Ind. 447.....144
 Fulp v. Beaver, 136 Ind. 319. 45

 Gage v. Springer, 211 Ill. 200.667
 Gallagher v. Humphrey, 6 L. T. (N. S.) 684.....404
 Garbutt v. Mayo, 13 L. R. A. (N. S.) 98, note.....201
 Garrick v. Garrick, 43 Ind. App. 585.....183
 Garrigus v. Home, etc., Soc., 3 Ind. App. 91.....458
 Garvey v. Rhode Island Co., 26 R. I. 80.....225
 Gazlay v. Williams, 147 Fed. 678.....205
 German-American Ins. Co. v. Yeagley, 163 Ind. 651..75, 526
 German Fire Ins. Co. v. Zonkers, 57 Ind. App. 696.....153
 Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392....421
 Gerrish v. Shattuck, 132 Mass. 235.....638
 Gershner v. Scott-Mayer, etc., Co., 93 Ark. 301.....522
 Giaconi v. City of Astoria, 60 Or. 12.....484, 487
 Gilbert v. Duluth Gen. Elec. Co., 93 Minn. 99.....347
 Gillespie v. Duling, 41 Ind. App. 217.....379
 Gilson v. Delaware, etc., Canal Co., 65 Vt. 213.....653
 Givens v. Kentucky Cent. R. Co., 12 Ky. L. Rep. 950....398
 Gleason v. Wilson, 48 Kan. 500.....50
 Godman v. Henby, 37 Ind. App. 1.....144, 456
 Goldsmith v. First Nat. Bank, 50 Ind. App. 11.....458, 479
 Goodrich v. Stangland, 155 Ind. 279.....660
 Gordon v. Cummings, 152 Mass. 513.....395
 Gould v. Cayuga County Nat. Bank, 99 N. Y. 333.....307
 — v. Steyer, 75 Ind. 50....341
 Gould Steel Co. v. Richards, 30 Ind. App. 348.....377
 Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140.....681
 Grafton v. Moir, 130 N. Y. 465.....638
 Grand Lodge, etc. v. Marshall, 31 Ind. App. 534....526
 Grand Rapids, etc., R. Co. v. Ellison, 117 Ind. 234.....690
 Grand Trunk, etc., R. Co. v. Reynolds, 175 Ind. 161....516
 Granger v. Boswinkle, 50 Ind. App. 114.....344
 Graves v. Tacoma R., etc., Co., 72 Wash. 387.....226
 — v. Thomas, 95 Ind. 361..407
 Gray v. Stiver, 24 Ind. 174..181
 Green v. Chicago, etc., R. Co., 110 Mich. 648.....397
 — v. City of Indianapolis, 25 Ind. 490.....142
 Gregory v. Arms, 48 Ind. App. 562.....493
 Grigsby v. Akin, 128 Ind. 591.540
 Grossman v. Lauber, 29 Ind. 618.....499
 Guyer v. Union Trust Co., 55 Ind. App. 472.....343
 Guynn v. Wabash, etc., Trust Co., 53 Ind. App. 391.....500

 Hall v. Gavitt, 18 Ind. 390..111
 — v. McDonald, 171 Ind. 9.311
 Hamilton v. State, 103 Ind. 96.....275
 Hammock v. City of Tacoma, 40 Wash. 539.....622, 624
 Hammond v. Kingan & Co., 53 Ind. App. 252.....570
 Hamrick v. Hoover, 41 Ind. App. 411.....44, 46
 Hancock v. Diamond Plate Glass Co., 162 Ind. 146....204, 502, 503
 Hanlon v. Doherty, 109 Ind. 37.....493
 Hanover Nat. Bank v. Blake, 142 N. Y. 404.....104, 111
 Harmon v. Brown, 58 Ind. 207.....286
 — v. Pohle, 55 Ind. App. 439.....154
 Harriman v. Pittsburgh, etc., R. Co., 45 Ohio St. 11....406
 Harris v. Carpenter, 109 Ind. 540.....174
 — v. Cook, 28 N. J. Eq. 345.324

Harris v. Pittsburgh, etc., R. Co., 32 Ind. App. 600.....	579, 580, 581
— v. Randolph County Bank, 157 Ind. 120.....	144
— v. Stevens, 31 Vt. 79....	393
Harrison v. Edwards, 12 Vt. 648.....	459
Harshman v. Mitchell, 117 Ind. 312.....	500
Hart v. Pennsylvania R. Co., 112 U. S. 331.....	334
Hase v. City of Seattle, 51 Wash. 174.....	622
Hatfield v. Jackson, 50 Ind. 507.....	181
Hawk v. McComes, 98 Ind. 460.....	280
Hawkins v. Johnson, 105 Ind. 29.....	393
— v. Thomas, 3 Ind. App. 399.....	342, 344
Hawley v. Zigerly, 135 Ind. 248.....	181
H. B. Smith Co. v. Williams, 29 Ind. App. 336.....	275
Health Dept. v. Rector of Trinity Church, 145 N. Y. 32.....	591
Hebert v. Lake Charles Ice, etc., Co., 111 La. 522.....	347
Heck v. Greenwood Tel. Co., 35 Ind. App. 244.....	358
Hedrick v. D. M. Osborne & Co., 99 Ind. 143.....	499
— v. Hedrick, 48 Ind. App. 658.....	104
Helberg v. Dovenmuehle, 37 Ind. App. 377.....	445
Heller v. Dalley, 28 Ind. App. 555.....	681
Hellman v. Hellman, 129 Ind. 59.....	174, 288
Henderson v. Bliss, 8 Ind. 100.....	233
— v. McGruder, 49 Ind. App. 682.....	67
Henry v. Epstein, 50 Ind. App. 660.....	166, 516
Herrick v. Morrill, 37 Minn. 250.....	275
Heyder v. Excelsior Bldg., etc., Co., 42 N. J. Eq. 403.....	324
Hibbitts v. Jack, 97 Ind. 570.....	286, 287
Hickman v. Rayl, 55 Ind. 551.....	200
Higgins v. Street, 19 Okl. 45.....	206
Hill v. Indianapolis, etc., R. Co., 31 Ind. App. 98.....	220
Hill v. Newman, 47 Ind. 187.....	511
Hillyard v. Robbins, 53 Ind. App. 107.....	189
Hindson v. Markle, 171 Pa. St. 138.....	653
Hines v. Board, etc., 93 Ind. 266.....	194
Hodson v. Great Camp, etc., 47 Ind. App. 113.....	7
Hoffman v. Isler, 49 Ind. App. 284.....	80
Holland v. Taylor, 111 Ind. 121.....	259
Holloran v. Midland R. Co., 129 Ind. 274.....	445, 447
Home Ins. Co. v. Marple, 1 Ind. App. 411.....	421, 424
Hoover v. Hoover, 116 Ind. 498.....	174
Hornet v. Dumbeck, 39 Ind. App. 482.....	544
Houk v. Citizens Nat. Bank, 51 Ind. App. 628.....	436
Houston, etc., R. Co. v. Boozer, 70 Tex. 530.....	141
Hoylman v. Kanawha, etc., R. Co., 22 L. R. A. (N. S.) 741, note.....	580
Hubbard v. Burnett-Lewis Lumber Co., 51 Ind. App. 97.....	59
Huber Mfg. Co. v. Blessing, 51 Ind. App. 89.....	158
Hudson v. Evans, 81 Ind. 596.....	236
Huffman v. State, 21 Ind. App. 449.....	157
Hunter v. Bales, 24 Ind. 299.....	500
Huntington v. Clark, 39 Conn. 540.....	104
Huntington Brewing Co. v. Miles, 177 Ind. 109.....	472
Huntington, etc., Co. v. Parsons, 62 W. Va. 26.....	200
Hutchinson v. Wenzel, 155 Ind. 49.....	67, 480
Hutton v. Stoddart, 83 Ind. 539.....	92
Hutts v. Martin, 131 Ind. 1.....	447
Hyatt v. Mattingly, 68 Ind. 271.....	140
Hyde v. Missouri Pac. R. Co., 110 Mo. 272.....	363
— v. Union Pac. R. Co., 7 Utah 356.....	398
Illinois Cent. R. Co. v. Murphy, 123 Ky. 787.....	397

No Oil Co. v. Indiana Nat. Gas, etc., Co., 174 Ind. 635.356	In re Corby's Estate, 154 Mich. 353.....362
Indermaur v. Dames, 1 C. C. P. (Law Reports, 1865) 280.....393, 404	In re Opinion of Justices, 209 Mass. 607.....591
Indiana Bond Co. v. Shearer, 24 Ind. App. 622.....220, 532	In re Philadelphia, etc., R. Co., 6 Whart. (Pa.) 25....360
Indiana Car Co. v. Parker, 100 Ind. 181.....554, 563	Ireland v. Huffman, 172 Ind. 278.....160
Indiana, etc., Oil Co. v. O'Brien, 160 Ind. 266.....627	— v. State, ex rel., 165 Ind. 377.....535
Indiana, etc., R. Co. v. Barnhart, 115 Ind. 399.....393	Island Coal Co. v. Clemmitt, 19 Ind. App. 21.....651
Indiana Nat. Gas, etc., Co. v. Vauble, 31 Ind. App. 370...480	Ivens v. Cincinnati, etc., R. Co., 103 Ind. 27.....392
Indiana Union Traction Co. v. Love, 180 Ind. 442..146, 692	Jackson v. City of Grand Forks, 24 N. Dak. 601....628
Indianapolis Cabinet Co. v. Herrman, 7 Ind. App. 462..270	Jarrell v. Brubaker, 150 Ind. 260.....500
— v. Pitzer, 109 Ind. 179..402	Jeffersonville, etc., R. Co. v. Daugherty, 40 Ind. 33....666
Indianapolis, etc., Traction Co. v. Brennan, 174 Ind. 1.....188, 337	— v. Hendricks, 26 Ind. 228.....579, 581
— v. Henderson. 39 Ind. App. 324.....166	— v. Swift, 26 Ind. 459....581
Indianapolis Southern R. Co. v. Emmerson, 52 Ind. App. 403.....692	— v. Holden, 180 Ind. 301.. 23
Indianapolis St. R. Co. v. Bolin, 39 Ind. App. 169....433	Jelly v. North Jersey St. R. Co., 76 N. J. L. 191.....225
— v. Hoffman, 40 Ind. App. 508.....432	Jenner v. Carson, 111 Ind. 522.....65
— v. Marschke, 166 Ind. 490.....119, 164, 166, 647	Jenney Electric Co. v. Branham, 145 Ind. 314.....564
— v. Ray, 167 Ind. 236....591	— v. Flannery, 53 Ind. App. 397.....561
— v. Schmidt, 35 Ind. App. 202.....516	Jennings v. Brotherhood Acc. Co., 44 Colo. 68.....76
— v. Taylor, 158 Ind. 274..216	— v. Ingle, 35 Ind. App. 153.....515
Indianapolis Traction, etc., Co. v. Croly, 54 Ind. App. 566.....408	Jensen v. Palatine Ins. Co., 81 Neb. 523.....76
— v. Gillaspay, 56 Ind. App. 332.....124	Johnson v. City of Fargo, 15 N. Dak. 525.....622, 624
— v. Henby, 178 Ind. 239.. 67	— v. Lake Superior, etc., Transfer Co., 86 Wis. 64....397
— v. Kidd, 167 Ind. 402....119	— v. Louisville, etc., R. Co., 122 Ky. 487.....397
— v. Romans, 40 Ind. App. 184.....690	— v. Stephenson, 104 Ind. 368.....445
Indianapolis Union R. Co. v. Houllhan, 157 Ind. 404....109	Jones v. Luddington, 180 Ind. 33.....43
— v. Waddington, 169 Ind. 448.....570, 690, 691	— v. McGinnis, 58 Ind. App. 124.....445
Indianapolis Water Co. v. Harold, 170 Ind. 170.....387	Jordan v. Johnson, 50 Ind. App. 213.....499
Ingalls v. Miller, 121 Ind. 188.....193, 194	Joseph E. Lay Co. v. Mendenhall, 54 Ind. App. 342.....154, 274
	Judd v. City of New Britain, 81 Conn. 300.....622

June v. Boston, etc., R. Co., 153 Mass. 79.....	392	Lafayette, etc., R. Co. v. Pattison, 41 Ind. 312..	193, 194
Kahle v. Crown Oil Co., 180 Ind. 131.....	224	Lafayette Plankroad Co. v. New Albany, etc., R. Co., 13 Ind. 90.....	248
— v. Carl, 227 U. S. 639...	335	Laffery v. United States Gyp- sum Co., 83 Kan. 349....	488
Kansas City, etc., R. Co. v. Stouer, 51 Fed. 649.....	601	Lake Erie, etc., R. Co. v. Beals, 50 Ind. App. 450....	376
Karr v. Board, etc., 170 Ind. 571.....	665	— v. Brafford, 15 Ind. App. 655.....	138, 142
Keesling v. Doyle, 8 Ind. App. 43.....	65	— v. Huffman, 177 Ind. 126	579, 580
Keller v. Jordan, 147 Ind. 113.....	677	— v. McHenry, 10 Ind. App. 525.....	553
Kelley v. Augsperger, 171 Ind. 155.....	542	— v. Marott, 52 Ind. App. 332.....	205
— v. Todd, 1 W. Va. 197..	270	— v. Oland, 49 Ind. App. 494	432, 433, 436, 571
Kelly v. Boston Elevated R. Co., 197 Mass. 420.....	227	— v. Parrish, 46 Ind. App. 577.....	560
Kentucky, etc., Bridge Co. v. Eastman, 7 Ind. App. 514..	480	— v. Town of Boswell, 137 Ind. 336.....	380
Keys v. McDowell, 54 Ind. App. 263.....	689	— v. Voliva, 53 Ind. App. 170.....	355
Kimball v. Whitney, 15 Ind. 280.....	458	Lake Shore, etc., R. Co. v. Boyts, 16 Ind. App. 640....	571
Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577.....	363	— v. Chicago, etc., R. Co., 48 Ind. App. 584.....	653
King v. Inland Steel Co., 177 Ind. 201.....	594	— v. McIntosh, 140 Ind. 261..	570
Kinmore v. Cresse, 53 Ind. App. 693.....	646	— v. Myers, 52 Ind. App. 59	134, 135, 137, 146
Klein v. New York Life Ins. Co., 104 U. S. 89.....	526	Lakka v. Modern Brother- hood, etc., 163 Iowa 159...	305
Kline v. Dowling, 176 Ind. 521.....	234	Lamb v. Holmes, 60 Ill. 497..	144
Klippel v. Shields, 90 Ind. 81..	493	Laporte Carriage Co. v. Sul- lender, 165 Ind. 290.....	556
Klitzke v. Smith, 46 Ind. App. 26.....	461	Larimer v. Krau, 57 Ind. App. 33.....	170
Knapheide v. Eastman, 20 Minn. 478.....	653	Larue v. American Diesel Engine Co., 176 Ind. 609...	638
Knickerbocker Ice Co. v. Gray, 171 Ind. 395.....	646	Lary v. Cleveland, etc., R. Co., 78 Ind. 323.....	392, 393
Knights, etc., Ins. Order v. Shoaf, 166 Ind. 367.....	7	Latta v. Miller, 109 Ind. 302..	93
Knoxville v. Cain, 48 L. R. A. (N. S.) 628, note.....	629	Law v. Streeter, 66 N. H. 36..	638
Kokomo Nat. Gas, etc., Co. v. Matlock, 177 Ind. 225...	504	Lawrence v. Leathers, 31 Ind. App. 414.....	67
Korrad v. Lake Shore, etc., R. Co., 131 Ind. 261.....	603	Lechner v. Strauss, 50 Ind. App. 414.....	422
Kothe v. Krag-Reynolds Co., 20 Ind. App. 293.....	612	Leeds v. City of Richmond, 102 Ind. 372.....	484
Krause v. Equitable Life Assur. Soc., 99 Mich. 461...	75	Lemans v. Wiley, 92 Ind. 436..	193
Krotz v. A. R. Beck Lumber Co., 34 Ind. App. 577.....	32	Leonard v. City of Terre Haute, 48 Ind. App. 104...	265
Kunkle v. Coleman, 174 Ind. 315.....	91	Lerner v. Philadelphia, 21 L. R. A. (N. S.) 614, note....	629
		Levey v. Bigelow, 6 Ind. App. 677.....	328

Lewark v. Carter, 117 Ind. 206.....	436	Lyons v. City of New Albany, 54 Ind. App. 416.....	454, 553
Lexington, etc., R. Co. v. Applegate, 8 Dana (Ky.) 289.....	360	Lytton v. Baird, 95 Ind. 349.	166
— v. Ford Plate Glass Co., 84 Ind. 516.....	233	McBride v. Hardin County, 58 Iowa 219.....	115
Lillie v. Trentman, 130 Ind. 16.....	609	McBurnie v. Seaton, 111 Ind. 56.....	540
Lingenfelter v. Baltimore, etc., R. Co., 154 Ind. 49	392, 393	McCardle v. McGinley, 86 Ind. 538.....	65
Littler v. Friend, 167 Ind. 36.	30	McChesney v. Illinois Cent. R. Co., 197 Fed. 85.....	590
Live Stock Ins. Co. v. Edgar, 56 Ind. App. 489.....	509	McClarren v. Jefferson School Tp., 169 Ind. 140.....	157, 158
Long v. Shackelford, 25 Miss. 559.....	92	McCleary v. Chipman, 32 Ind. App. 489.....	93
Loomis v. Terry, 17 Wend. (N. Y.) *496.....	407	McComb v. City of Chicago, 263 Ill. 510.....	622, 624
Lord v. Wilcox, 99 Ind. 491.	540	McConnathy v. Deck, 34 Colo. 232.....	590
Louisville, etc., Lighting Co. v. Hynes, 47 Ind. App. 507	569, 690	McConnel v. Dewey, 5 Neb. 385.....	670
Louisville, etc., R. Co. v. Bean, 9 Ind. App. 240..	579, 580	McDonald v. Chicago, etc., R. Co., 41 Minn. 439.....	316
— v. Berkeley, 136 Ind. 591	157, 564	McFadden v. Schroeder, 9 Ind. App. 49.....	265
— v. Caldwell, 98 Ind. 245..	460	McGee v. Overshiner, 150 Ind. 127.....	363
— v. Creek, 130 Ind. 139...	571	McGrath v. City of St. Louis, 215 Mo. 191.....	487
— v. Crunk, 119 Ind. 542	579, 580	McLain v. Draper, 109 Ind. 556.....	95, 233
— v. Daniel, 122 Ky. 256..	397	McLendon v. State, 21 L. R. A. 738, note.....	344
— v. Heck, 151 Ind. 292...	554	— v. —, 92 Tenn. 520.....	342
— v. Hollerbach, 105 Ind. 137.....	435	McNamee v. Rauck, 128 Ind. 59.....	189
— v. Klyman, 108 Tenn. 304	212	McReynolds v. Smith, 172 Ind. 336.....	16
— v. Lamb, 6 L. R. A. 195, note.....	581	McWhinney v. City of Logans- port, 132 Ind. 9.....	194
— v. Martin, 17 Ind. App. 679.....	660	McWhorter v. Heltzell, 124 Ind. 129.....	356
— v. Ryan, 64 Miss. 399...	697	Magic Packing Co. v. Stone, etc., Co., 158 Ind. 538.....	460
— v. Shanks, 132 Ind. 395.	435	Magnuson v. Billings, 152 Ind. 177.....	312
— v. Sparks, 12 Ind. App. 410.....	12	Maguire v. Bissell, 119 Ind. 345.....	544
— v. Wright, 134 Ind. 509..	319	Majestic Life Ins. Co. v. Tuttle, 58 Ind. App. 98.....	303
Louisville, etc., Traction Co. v. Lloyd, 58 Ind. App. 39	124, 435	Malott v. Hawkins, 159 Ind. 127.....	433
— v. Lottich, 59 Ind. App. 426.....	137, 517	Manlove v. Cleveland, etc., R. Co., 29 Ind. App. 694...	392
— v. Walker, 177 Ind. 38..	692	Mannix v. State, ex rel., 115 Ind. 245.....	660
L. S. Ayres & Co. v. Har- mon, 56 Ind. App. 436....	693	Maple v. Cincinnati, etc., R. Co., 40 Ohio St. 313.....	60
Lucas v. Rhodes, 48 Ind. App. 211.....	104		
— v. Richmond, etc., R. Co., 40 Fed. 566.....	392		
Lynn v. Adams, 2 Ind. 143..	670		

Marietta Glass Mfg. Co. v. Pruitt, 180 Ind. 434.....	554
Marks v. Mariotte, 51 Ind. App. 281.....	82
Martin v. Chicago, etc., R. Co., 194 Ill. 138.....	392
— v. Hughes Creek Coal Co., 70 W. Va. 711.....	398
— v. Stanfield, 17 Ind. 336.194	
Masconi v. Hert, 52 Ind. App. 345.....	445
Mason v. Mason, 160 Ind. 191.....	259
Masonic, etc., Soc. v. Burkhardt, 110 Ind. 189.....	258, 259
Masten v. Indiana Car, etc., Co., 19 Ind. App. 633.....	542
Matlock v. Strange, 8 Ind. 57.....	343
Matter of Reisenberg, 208 U. S. 92.....	638
Mattison v. Marks, 31 Mich. 421.....	528
Matulewicz v. Metropolitan St. R. Co., 107 App. Div. 230.....	225
Maxwell v. Wright, 160 Ind. 515.....	61
Maybury v. Berkery, 102 Mich. 126.....	459
Mayer v. Feig, 114 Ind. 577.....	46, 47
Mayhew v. Burns, 103 Ind. 328.....	318, 319
Maynard v. East, 13 Ind. App. 432.....	189
— v. Waidlich, 156 Ind. 562.358	
Memphis, etc., Elec. Co. v. Speers, 113 Tenn. 83.....	347
Merchants, etc., Sav. Bank v. Frazee, 9 Ind. App. 161.....	270
Merica v. Fort Wayne, etc., Traction Co., 49 Ind. App. 288.....	647
Merwin v. Magone, 70 Fed. 776.....	456
Mesker v. Bishop, 56 Ind. App. 455.....	221
Metropolitan Life Ins. Co. v. Johnson, 49 Ind. App. 233.....	5, 75
Meyer, etc., Co. v. Shenkberg Co., 11 S. Dak. 620.....	44
Mezchen v. More, 54 Wis. 214.....	275
Michigan Cent. R. Co. v. Hammond, etc., R. Co., 42 Ind. App. 66.....	380
Michigan Mut. Life Ins. Co. v. Frankel, 151 Ind. 534.....	445, 447
Miles v. Casualty Co., 115 N. Y. Supp. 1.....	76
Miller v. Louisville, etc., R. Co., 128 Ind. 97.....	554, 571
Milner v. Bowman, 119 Ind. 448.....	258
Miner v. Lorman, 70 Mich. 173.....	499
Minneapolis Gen. Elec. Co. v. Cronon, 166 Fed. 651....	347
Missouri, etc., R. Co. v. Harriman, 227 U. S. 657.....	335
Missouri Pac. R. Co. v. Lee, 70 Tex. 496.....	380
Modern Brotherhood v. Matkovitch, 56 Ind. App. 8.....	258, 259
Modern Woodmen, etc. v. Breckenridge, 10 L. R. A. (N. S.) 136, note.....	302
— v. Coleman, 64 Neb. 162.303	
— v. Craiger, 175 Ind. 30..	7
— v. Vincent, 40 Ind. App. 711.....	5
Monnett v. Hemphill, 110 Ind. 299.....	337
Monteith v. Kokomo, etc., Co., 159 Ind. 149.....	559
Moore v. Coughlin, 36 Okl. 252.....	270
— v. Harmon, 142 Ind. 555.109	
— v. Morris, 142 Ind. 354..	422
— v. Ross, 139 Ind. 200....	182
Moores v. Hare, 144 Ind. 573.174	
Moorman v. Barton, 16 Ind. 206.....	143
Moravian Seminary v. Bethlehem Borough, 153 Pa. St. 583.....	697
Morgan v. Worden, 145 Ind. 600.....	45
Morgantown Mfg. Co. v. Hicks, 46 Ind. App. 623....	647
Morris v. Salt Lake City, 35 Utah 474.....	487
Morrison v. Schlesinger, 10 Ind. App. 665.....	104
Morrow v. Sweeney, 10 Ind. App. 626.....	394
Mortimer v. Daub, 52 Ind. App. 30.....	119
Moss v. Cummings, 44 Mich. 359.....	667
Mullin v. California Horse-shoe Co., 105 Cal. 77.....	316

- Murch Bros. Constr. Co. v. Johnson**, 203 Fed 1.....456
Murphy v. City of Indianapolis, 83 Ind. 76.....626
Musser v. State, 157 Ind. 423. 65
Mutual Life Ins. Co. v. Kelly, 114 Fed. 268..... 9
M. S. Huey Co. v. Johnston, 164 Ind. 489.....435, 630
Myers v. Carney, 171 Ind. 379.....173
 — v. Reynolds, 47 Ind. App. 233.....234

Nagle v. Wakey, 161 Ill. 387. 670
National Surety Co. v. But-ton, 41 Ind. App. 301..446, 447
 — v. State, ex rel., 181 Ind. 54.....357
Nave v. Flack, 90 Ind. 205..393
Neal v. Springfield St. R. Co., 189 Mass. 351.....226
Neeley v. Searight, 113 Ind. 316..... 33
Neely v. Chinn, 8 Blackf. 84..144
Neff v. Elder, 84 Ark. 277....499
Negley v. Lindsay, 67 Pa. St. 217.....111
Nelson v. Cottingham, 152 Ind. 135.....358
 — v. Davis, 40 Ind. 366....470
 — v. Nelson, 36 Ind. App. 331.....174
New v. Sailors, 114 Ind. 407 46, 47
Newcastle Bridge Co. v. Doty, 168 Ind. 259.....630
Newcomer v. Hutchins, 96 Ind. 119.....189
New York, etc., R. Co. v. Perriguy, 138 Ind. 414...554
 — v. Robbins, 38 Ind. App. 172.....377
Niagara Oil Co. v. Jackson, 48 Ind. App. 238.....651, 653
 — v. Ogle, 177 Ind. 292 651, 653
Nicholson v. Erie R. Co., 41 N. Y. 525.....394
Nickey v. Stender, 164 Ind. 189.....480, 557, 562
Nixon v. Beard, 111 Ind. 137.265
Nolan v. New York, etc., R. Co., 53 Conn. 461.....403
Noll v. Smith, 68 Ind. 188... 66
Norfolk, etc., Traction Co. v. White, 109 Va. 172....226

Northern Ind. Land Co. v. Brown, 182 Ind. 438.....639
Northwestern, etc., Ins. Co. v. Hazelett, 106 Ind. 212... 7
Noyes v. Ross, 23 Mont. 425. 51
Nutter v. Hendricks, 150 Ind. 605.....183

O'Brien v. City of St. Paul, 116 Minn. 249.....624
O'Connor v. Timmerman, 24 L. R. A. (N. S.) 1063, note.201
O'Harrow v. Whitney, 85 Ind. 140.....287
Ohio, etc., R. Co. v. Hecht, 115 Ind. 443.....436
 — v. Judy, 120 Ind. 397....140
 — v. McDonald, 5 Ind. App. 108.....377
 — v. Selby, 47 Ind. 471....435
Ohio, etc., R. Co. v. Stein, 140 Ind. 61.....166, 554
Ohio Farmers Ins. Co. v. Vogel, 166 Ind. 239..... 76
Ohio Oil Co. v. Griest, 30 Ind. App. 84.....422, 681
 — v. Westfall, 43 Ind. App. 661.....651, 653
Ohio Valley Buggy Co. v. Anderson Forging Co., 168 Ind. 593..... 16
O'Keefe v. Behrens, 8 L. R. A. (N. S.) 354, note.....181
Olcott v. McClure, 50 Ind. App. 79.....704
O'Mara v. Wabash R. Co., 150 Ind. 648.....447
O'Neill v. Board, etc., 41 N. J. L. 161.....697
Opp v. Ward, 125 Ind. 241...493
Opperman v. Littlejohn, 98 Miss. 636.....270
Orient Ins. Co. v. Kaptur, 176 Ind. 308..... 76
Orr v. Owens, 128 Ind. 229..181
Owen v. Harriott, 47 Ind. App. 359....124, 328, 582, 703

Palmer v. Oregon Short Line R. Co., 34 Utah 466..... 395, 396, 403
 — v. Poor, 121 Ind. 135....144
Park v. Board, etc., 3 Ind. App. 536.....486
Parker v. Pennsylvania Co., 134 Ind. 673.....392
 — v. Providence, etc., Steamship Co., 17 R. I. 376. 93

- Parsons v. Charleston, etc.,
 Elec. Co., 69 S. C. 305.....347
 Pate v. First Nat. Bank, 63
 Ind. 254.....458
 — v. French, 122 Ind. 10...269
 Patterson v. Churchman, 122
 Ind. 379.....144
 — v. Emerich, 21 Ind. App.
 614.....206
 Paulman v. Claycomb, 75
 Ind. 64.....458
 Peabody-Alwert Coal Co. v.
 Yandell, 179 Ind. 222.140, 141
 Percy v. Michigan Mut. Life
 Ins. Co., 111 Ind. 59.....521
 Pearl v. City of Bay City,
 174 Mich. 643....621, 622, 624
 Peck v. City of Michigan
 City, 149 Ind. 670.....638
 — v. Louisville, etc., R. Co.,
 101 Ind. 366.....356
 Peden v. Mail, 118 Ind. 560.. 65
 Pennsylvania Co. v. Coyer,
 163 Ind. 631.....25
 — v. Marion, 123 Ind. 415.580
 — v. Meyers, 136 Ind. 242.392
 — v. Weddle, 100 Ind. 138. 65
 — v. Hixon, 10 Ind. App.
 520.....581
 Pensacola Tel. Co. v. Western
 Union Tel. Co., 96 U. S. 1.360
 Penso v. McCormick, 125 Ind.
 116.....402, 406, 407
 People v. Sheldon, 156 N.
 Y. 268.....122
 Peoples v. City of Valparaiso,
 178 Ind. 673.....621
 Peoples Sav., etc., Assn. v.
 Spear, 115 Ind. 297.....34
 Peru Heating Co. v. Lenhart,
 48 Ind. App. 319.....23
 Pfaff v. Terre Haute, etc., R.
 Co., 108 Ind. 144.....355
 Pfeiffer v. Brown, 165 Pa. St.
 267.....653
 Phettiplace v. Northern Pac.
 R. Co., 84 Wis. 412.....212
 Philadelphia v. Barber, 160
 Pa. St. 123.....362
 Phillips v. Nicholas, 3 Blackf.
 133.....511
 Phoenix Ins. Co. v. Allen, 109
 Ind. 273.....75
 — v. Flowers, 124 S. W.
 (Ky.) 403.....76
 — v. Stevenson, 78 Ky. 150. 9
 — v. Tomlinson, 125 Ind.
 84.....526
 Pickett v. Green, 120 Ind. 584.109
 Picquet v. McKay, 2 Blackf.
 465.....693
 Pierce v. Drew, 136 Mass. 75.360
 Pierson v. Doe, 2 Ind. *123..356
 Pittsburgh, etc., R. Co. v.
 Adams, 105 Ind. 151.....553
 — v. Browning, 34 Ind. App.
 90.....690, 691
 — v. Burton, 139 Ind. 357
 25, 134, 135
 — v. Cottman, 52 Ind. App.
 661.....382
 — v. Gipe, 160 Ind. 360.... 93
 — v. Greb, 34 Ind. App. 625.703
 — v. Home Ins. Co., 183
 Ind. 355.....14
 — v. Macy, 59 Ind. App. 125
 307, 382
 — v. Miller, 33 Ind. App.
 128.....579, 581
 — v. Mitchell, 175 Ind. 196.335
 — v. Parish, 28 Ind. App.
 189.....317
 — v. Rogers, 45 Ind. App.
 230.....138, 142
 — v. Shaw, 15 Ind. App.
 173.....215
 — v. Terrell, 177 Ind. 447
 ...133, 134, 135, 136, 137, 146, 377
 — v. Town of Crothersville,
 159 Ind. 330.....357
 — v. Town of Crown Point,
 150 Ind. 536.....379
 Platter v. City of Seymour,
 86 Ind. 323.....535
 Plummer v. Dill, 156 Mass.
 426.....394
 Pomeroy v. Salt Co., 37 Ohio
 St. 520.....639
 Pomponio v. New York, etc.,
 R. Co., 66 Conn. 528..394, 404
 Pope v. Voigt, 49 Ind. App.
 176.....448
 Postal Tel. Cable Co. v. Eaton,
 170 Ill. 513.....363
 Postal Tel., etc., Co. v. Chi-
 cago, etc., R. Co., 30 Ind.
 App. 654.....363
 Potter Mfg. Co. v. A. B.
 Meyer & Co., 171 Ind. 513.. 32
 Pottltitzer v. Citizens Trust
 Co., 60 Ind. App. —.....638
 Pontius v. Kimble, 56 Ind.
 App. 144.....67
 Powell v. Bunker, 79 Ind. 468.194
 Powers Dry Goods Co. v.
 Harlin, 68 Minn. 193.....104
 Pratt v. Chicago, etc., R. Co.,
 38 Minn. 455.....691

Prest-O-Lite Co. v. Skeel, 182 Ind. 593.....	483	Robertson v. Hartenbower, 120 Iowa 410.....	697
Pringle v. Modern Woodmen, etc., 76 Neb. 384.....	303	Robinson v. Rohr, 73 Wis. 436.....	670
Prothero v. Citizens St. R. Co., 134 Ind. 431.....	690	— v. State, 177 Ind. 263....	477
Pugh v. Sample, 123 La. 791.....	494	Robinson & Co. v. Etter, 30 Ind. App. 253.....	317
Pulse v. Spencer, 57 Ind. App. 566.....	561	— v. Nipp, 20 Ind. App. 157.....	265
Pyke v. City of Jamestown, 15 N. Dak. 157.....	628	Rogers v. Leyden, 127 Ind. 50.....	554
Quality Clothes Shop v. Keeney, 57 Ind. App. 500....	14, 276	— v. Phenix Ins. Co., 121 Ind. 570.....	526
Quick v. Taylor, 113 Ind. 540.....	355	Rolf v. Rich, 149 Ill. 436....	423
Ragsdale v. Parrish, 74 Ind. 191.....	287	Romona, etc., Stone Co. v. Shields, 173 Ind. 68.....	563, 564
Rahke v. McNulty, 55 Ind. App. 615.....	312	Rose v. Chicago, etc., R. Co., 181 Ind. 658.....	80
— v. State, 168 Ind. 615....	480	Rosenthal v. Chicago, etc., R. Co., 255 Ill. 552.....	378
Red River, etc., Bank v. Barnes, 8 N. Dak. 432....	44	Ross v. Hanna, 173 Ind. 671..	361
Reddick v. Keesling, 129 Ind. 128.....	436	Roszell v. Roszell, 109 Ind. 354.....	470
Redigan v. Boston, etc., R. Co., 155 Mass. 44.....	392	Roush v. Roush, 154 Ind. 562.....	270, 638
Redmen, etc., Assn. v. Rippey, 181 Ind. 454.....	7	Route v. Ninde, 118 Ind. 123.....	660
Reeves v. Hayes, 95 Ind. 521.....	323	Rowland v. City of Greencastle, 157 Ind. 591.....	142
Reibel v. Cincinnati, etc., R. Co., 114 Ind. 476.....	580, 581	Royse v. Bourne, 149 Ind. 187.....	358
Reissner v. Oxley, 80 Ind. 580.....	270	Rubey v. Hough, 161 Ind. 203.....	275
Republic Iron, etc., Co. v. Lulu, 48 Ind. App. 271....	319	Rusche v. Pitman, 34 Ind. App. 159.....	34
Rhea v. Sawyer, 54 Ind. App. 512.....	480	Rush v. Foos Mfg. Co., 20 Ind. App. 515.....	91
Rhodes v. State, 128 Ind. 189.....	248	— v. Rush, 40 Ind. 83.....	288, 289
Rice v. City of Evansville, 108 Ind. 7.....	25	Ruston v. Biddle, 43 Ind. 515.....	65
Richardson v. Coleman, 131 Ind. 210.....	123	Ryan v. Burkam, 42 Ind. 507.....	233
Richey v. Cleveland, etc., R. Co., 176 Ind. 542.....	703	— v. Curran, 64 Ind. 345.....	484, 487
— v. —, 47 Ind. App. 123.....	703	Sahm v. State, ex rel., 172 Ind. 237.....	500
Richwine v. Presbyterian Church, 135 Ind. 80.....	183	Salem Iron Co. v. Hyland, 74 Ohio St. 160.....	653
Riggs v. Purcell, 66 N. Y. 193.....	205	Salliotte v. King Bridge Co., 122 Fed. 378.....	484, 488
Ripley v. Lemcke, 43 Ind. App. 336.....	31	Salmon v. Kansas City, 241 Mo. 14.....	483, 486
Risch v. Burch, 175 Ind. 621.....	502	San Antonio, etc., R. Co. v. Bowles, 88 Tex. 634.....	690
Ritter v. Cost, 99 Ind. 80.....	493	Sanderson v. Trump Mfg. Co., 180 Ind. 197.....	357
Roberts v. Kendall, 3 Ind. App. 339.....	65	Sappington v. City of Centralia, 162 Mo. App. 418....	487
— v. Spencer, 123 Mass. 397.....	425	Sare v. Hoadley Stone Co., 57 Ind. App. 464.....	559, 561
Robertson v. Ford, 164 Ind. 538.....	556	Sasse v. Rogers, 40 Ind. App. 197.....	65

Scanlin v. Stewart, 138 Ind. 574.....	660	Skinner v. Spann, 175 Ind. 672.....	285, 285
Schaffner v. Voss, 46 Ind. App. 551.....	355	Smalley v. Rio Grande, etc., R. Co., 34 Utah 423.....	398
Schee v. Wiseman, 79 Ind. 389.....	202	— v. Southern R. Co., 57 S. C. 243.....	397
Schele v. Wagner, 163 Ind. 20.....	454, 456, 457	Smith v. Andrew, 50 Ind. App. 602.....	362
Schenck v. Ballou, 253 Ill. 415.....	528	— v. Board, etc., 6 Ind. App. 153.....	270
Schierman v. Beckett, 88 Ind. 52.....	157	— v. Dodd, 35 Ind. 452....	202
Scully v. McGrath, 201 N. Y. 61.....	94	— v. Gale, 144 U. S. 609....	638
Seller v. State, ex rel., 160 Ind. 605.....	362	— v. Graves, 59 Ind. App. 55.....	676
Seisler v. Smith, 150 Ind. 88.220		— v. Long, 43 Ind. App. 668.542	
Selma St., etc., R. Co. v. Owen, 132 Ala. 420.....	142	— v. Newbaur, 144 Ind. 95.189	
Sessengut v. Posey, 67 Ind. 408.....	486, 487	— v. Schweigerer, 129 Ind. 363.....	156
Sessions v. Johnson, 95 U. S. 347.....	60	Snare & Triest Co. v. Fried- man, 169 Fed. 1.....	397
Seybold v. Rehwald, 177 Ind. 301.....	43	Sohl v. Evans, 29 Ind. App. 634.....	447
Shanks v. Robinson, 130 Ind. 479.....	65	Solberg v. Schlosser, 20 N. Dak. 307.....	486
Shartle v. Modern Brother- hood, etc., 139 Mo. App. 433	305	Sollenberger v. Lineville, 18 Ann. Cas. 991, note...622, 624	
Sharts v. Holloway, 150 Ind. 403.....	236	Sonnenberg v. Steinbach, 9 S. Dak. 518.....	540
Shedd v. American Malze Products Co., 60 Ind. App. —.....	635, 636, 639	Souders v. Jeffries, 107 Ind. 552.....	181
Shelton v. Marshall, 16 Tex. 344.....	111	South Bend Iron Works v. Larger, 11 Ind. App. 367....	392
Shenk v. Stahl, 35 Ind. App. 493.....	681	South Bend Mfg. Co. v. Lip- harp, 12 Ind. App. 185....	691
Shirley Hill Coal Co. v. Moore, 181 Ind. 513.....	136	South Covington, etc., R. Co. v. Besse, 16 L. R. A. (N. S.) 890, note.....	226
Shirk v. Whitten, 131 Ind. 455.....	493, 494	Southern Ind. R. Co. v. Dren- nen, 44 Ind. App. 14.....	119
— v. Wilson, 13 Ind. 129....	233	Southern R. Co. v. Ansley, 8 Ga. App. 325.....	590
Shotliff v. Modern Woodmen, etc., 100 Mo. App. 138....	303	— v. Bailey, 110 Va. 833....	227
Shreve v. City of Fort Wayne, 176 Ind. 347.....	619	— v. Chatman, 124 Ga. 1026	397
Shuck v. State, ex rel., 136 Ind. 63.....	25	— v. Elliott, 170 Ind. 273	59, 559
Sievers v. Peters, etc., Lum- ber Co., 151 Ind. 642.....	629	— v. Friedly, 52 Ind. App. 192.....	12
Simplex, etc., Appliance Co. v. Kameradt, 180 Ind. 296..	569	— v. Howerton, 182 Ind. 208.....	648
Simpson v. Kansas City, 111 Mo. 237.....	697	— v. Sittasen, 166 Ind. 257.660	
Sinclair v. Gunzenhauser, 179 Ind. 78.....	179	Sowers v. Cincinnati, etc., R. Co., 162 Ind. 676.....	697
		Spaulding v. Mott, 167 Ind. 58.....	91
		Spicer v. Chesapeake, etc., R. Co., 34 W. Va. 514....	392
		Spiro v. Robertson, 57 Ind. App. 229.....	278

Springer v. Foster, 27 Ind. App. 15.....	493	Stewart v. Swartz, 57 Ind. App. 249.....	379
Spurgeon v. Swain, 13 Ind. App. 188.....	460	Stiles v. Hasler, 56 Ind. App. 88.....	14, 278, 508
Staldter v. City of Huntington, 153 Ind. 354.....	484, 487	Stillwell v. Knapper, 69 Ind. 558.....	289
Standard Forgings Co. v. Holmstrom, 58 Ind. App. 306.....	318	St. Joseph Mfg. Co. v. Hubbard, 36 Ind. App. 84.....	660
Starr v. Aetna Life Ins. Co., 4 L. R. A. (N. S.) 636, note.....	7	St. Louis, etc., R. Co. v. Bishard, 147 Fed. 496.....	122
State v. Barrett, 172 Ind. 169.....	603	— v. Yonly, 53 Ark. 503.....	488
— v. Ensley, 177 Ind. 483.....	361	Stone v. Elliott, 182 Ind. 454.....	179
— v. Harris, 50 L. R. A. (N. S.) 973, note.....	249	Stonehill v. Stonehill, 146 Ind. 445.....	540
— v. Roberts, 166 Ind. 585.....	91	Storms v. Stevens, 104 Ind. 46.....	362
— v. Tam, 178 Ind. 313.....	91	Stout v. Price, 24 Ind. App. 360.....	45, 46, 47, 51
— v. Weaver, 58 S. C. 106.....	247	St. Paul, etc., R. Co. v. City of Minneapolis, 44 Minn. 149.....	380
State, ex rel. v. Bartholomew, 176 Ind. 182.....	278, 508	St. Paul Water Co. v. Ware, 16 Wall. 566.....	486, 487
— v. Black, 166 Ind. 138.....	535	Straight v. Hover, 79 Ohio St. 263.....	653
— v. Board, etc., 167 Ind. 276.....	703	Strange v. Board, etc., 173 Ind. 640.....	360, 361
— v. Clausmeyer, 154 Ind. 599.....	344	Streeter v. Western Wheeled Scraper Co., 254 Ill. 244.....	559
— v. Clifton, 157 Ind. 581.....	663	Stremmel v. Gaar, Scott & Co., 176 Ind. 600.....	472
— v. Daly, 175 Ind. 108.....	265	Stuckman v. Roose, 147 Ind. 402.....	493
— v. Delano, 34 Ind. 52.....	274	Stumm v. Hummel, 39 Iowa 478.....	522
— v. Flynn, 161 Ind. 554.....	342, 344	Sullivan v. Indianapolis, etc., Traction Co., 55 Ind. App. 407.....	553
— v. Harris, 89 Ind. 363.....	667	— v. Waters, 14 Ir. Q. L. 460.....	404
— v. Howard, 174 Ind. 358.....	535	Summit v. Yount, 109 Ind. 506.....	285, 287
— v. Kamman, 151 Ind. 407.....	663	Sundling v. Willey, 19 S. Dak. 293.....	456
— v. Lyons, 173 Ind. 278.....	470	Supreme Council, etc. v. Apman, 39 Ind. App. 670.....	307
— v. Myers, 100 Ind. 487.....	341	Supreme Court, etc. v. Sullivan, 26 Ind. App. 60.....	301, 302
— v. Sherk, 168 Ind. 553.....	542	Supreme Lodge, etc. v. Bradley, 73 Ark. 274.....	8
— v. State Board, etc., 173 Ind. 706.....	341, 344	— v. Graham, 49 Ind. App. 535.....	295
— v. Taylor, 5 Ind. App. 29.....	522	Supreme Tent, etc. v. Ethridge, 43 Ind. App. 475.....	526
— v. Walford, 11 Ind. App. 392.....	344	— v. Volkert, 25 Ind. App. 627.....	302
Stauffer v. Hulwick, 176 Ind. 410.....	582, 703	Supreme Tribe, etc. v. Lennert, 178 Ind. 122.....	6, 302
Stayner v. Joyce, 120 Ind. 99.....	458		
Steele v. Robertson, 75 Ark. 228.....	499		
Stephenson v. State, 110 Ind. 358.....	522		
Stevens v. Nichols, 155 Mass. 472.....	404		
Steward v. Harvey College, 94 Mass. 58.....	404		
Stewart v. Chicago, etc., R. Co., 141 Ind. 55.....	109		
— v. Stewart, 175 Ind. 412.....	582		

Surber v. Mayfield, 156 Ind. 375.....	423	Tindall v. Miller, 143 Ind. 337.....	174
Swatts v. Bowen, 141 Ind. 322.....	493	Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co., 57 Ind. App. 644.....	224, 648
Sweeney v. Old Colony, etc., R. Co., 92 Mass. 368.....	392, 393, 394, 404	Toledo, etc., R. Co. v. Ber- gan, 9 Ind. App. 604.....	216
Swindell v. Houck, 2 Ind. App. 519.....	65	— v. Milligan, 52 Ind. 505	216, 558
Swing v. Marion Pulp Co., 47 Ind. App. 199.....	75	— v. Wingate, 143 Ind. 125.	581
Swygart v. Willard, 166 Ind. 25.....	565	Toll v. Wright, 37 Mich. 93..	181
		Toner v. Whybrew, 50 Ind. App. 387.....	32, 33
		Touhey v. City of Decatur, 175 Ind. 98.....	618, 621, 623
Talbott v. Hedge, 5 Ind. App. 555.....	458	Towers v. Lake Erie, etc., R. Co., 18 Ind. App. 684.....	690
Tate v. Hamlin, 149 Ind. 94	443, 447, 448	Town of Boswell v. Wakley, 149 Ind. 61.....	626
Taylor v. Elliott, 51 Ind. 375.	233	Town of Brazil v. Kress, 55 Ind. 14.....	193
— v. Gay, 6 Blackf. 150....	458	Town of Cicero v. Lake Erie, etc., R. Co., 52 Ind. App. 298.....	639
— v. Schradsky, 178 Ind. 217.....	82	Town of Clarksville v. Ohio Falls Mfg. Co., 56 Ind. App. 198.....	582
— v. Stephens, 165 Ind. 200	173	Town of Edinburg v. Hack- ney, 54 Ind. 83.....	193
Templer v. Muncie Lodge, etc., 50 Ind. App. 324.....	201	Town of Elkhart v. Ritter, 66 Ind. 136.....	619
Terre Haute Brew. Co. v. Ward, 56 Ind. App. 155....	646	Town of Knox v. Golding, 46 Ind. App. 634.....	91
Terre Haute, etc., R. Co. v. Bissell, 108 Ind. 113.....	363	Town of Newcastle v. Lake Erie, etc., R. Co., 155 Ind. 18.....	157, 158
— v. Graham, 95 Ind. 286..	392	Town of Windfall City v. First Nat. Bank, 172 Ind. 679.....	59
— v. Voelker, 129 Ill. 540..	142	Trimble v. New York, etc., R. Co., 162 N. Y. 84.....	456
Terre Haute, etc., Traction Co. v. Frischman, 57 Ind. App. 452.....	141	Trotter v. Grand Lodge, etc., 132 Iowa 513.....	302
— v. Young, 56 Ind. App. 25.....	480	Trustees, etc. v. Vail, 151 N. Y. 463.....	456
Terry v. State, 50 Tex. Cr. 438.....	121	Tucker v. Hyatt, 151 Ind. 332	65, 511, 632
Theobald v. Clapp, 43 Ind. App. 191.....	103, 472	— v. State, 163 Ind. 403....	344
Tholkes v. Dedock, 52 L. R. A. (N. S.) 142, note.....	662	Tunnel Mining, etc., Co. v. Cooper, 39 L. R. A. (N. S.) 1064, note.....	632
Thoma v. State, 86 Ind. 182.	274	Turner v. City of Indian- apolis, 96 Ind. 51.....	618, 619
Thomas v. Harrington, 72 N. H. 45.....	484	Turner & Co. v. Woodberry County, 57 Iowa 440.....	115
Thomas Madden, Son & Co. v. Wilcox, 174 Ind. 657	166, 167	Twist v. Winona, etc., R. Co., 39 Minn. 164.....	402
Thompson v. Simpson, 128 N. Y. 270.....	456	Tyler v. Anderson, 106 Ind. 185.....	109
— v. Turner, 173 Ind. 593..	289		
Thomson v. Madison Bldg., etc., Assn., 103 Ind. 279....	323		
Tibbits v. Mutual, etc., Ins. Co., 159 Ind. 671.....	526		
Timmonds v. Taylor, 48 Ind. App. 531.....	234		

CASES CITED.

xxvii

Tyner v. Hamilton, 51 Ind. 259.....	371	Wabash R. Co. v. De Hart, 32 Ind. App. 62.....	402
		— v. Farver, 111 Ind. 195	
Underwood v. Sample, 70 Ind. 446.....	93	.....	483, 484
Unfried v. Heberer, 63 Ind. 67.....	540	— v. Grate, 53 Ind. App. 588.....	109
Uhl v. Ohio River R. Co., 51 W. Va. 106.....	355	— v. McDoniels, 183 Ind. 104.....	562
Union Cent. Ins. Co. v. Pauly, 8 Ind. App. 85.....	526	— v. McNown, 53 Ind. App. 116.....	134, 223
Union, etc., Ins. Co. v. Whet- zel, 29 Ind. App. 658.....	302	— v. Priddy, 179 Ind. 483.....	335
Union Life Ins. Co. v. Jame- son, 31 Ind. App. 28.....	526	— v. Ray, 152 Ind. 392.....	317
Union Traction Co. v. Bowen, 57 Ind. App. 661.....	119, 408	Wagner v. Supreme Lodge, etc., 128 Mich. 660.....	305
— v. Vandercook, 32 Ind. App. 621.....	433	Walker v. Pittman, 108 Ind. 341.....	66
United States v. Allis, 73 Fed. 165.....	123	— v. Wehking, 29 Ind. App. 62.....	216
— v. Baltimore, etc., R. Co., 159 Fed. 33.....	362	Wall v. Simpson, 6 J. J. Marsh. (Ky.) 155.....	528
— v. Two Baskets, 205 Fed. 37.....	456	Ward v. Dougherty, 75 Cal. 240.....	459
United States, etc., Ins. Co. v. Batt, 49 Ind. App. 277.....	453	— v. Warren, 82 N. Y. 265.....	499
— v. Clark, 41 Ind. App. 345.	5	Warner v. Jennings, 44 Ind. App. 574.....	16
United States Cement Co. v. Cooper, 172 Ind. 590.....	556, 559	Warrick v. Spry, 49 Ind. App. 327.....	500
United States Furn. Co. v. Taschner, 40 Ind. App. 672.....	556	Washburn v. Union Central Life Ins. Co., 143 Ala. 485.	5
Unthank v. Henry County Turnpike Co., 6 Ind. 125.....	143	Watkins v. Brunt, 53 Ind. 208.....	612
Uppington v. City of New York, 165 N. Y. 222.....	483, 487	Waugh v. Riley, 68 Ind. 482.....	289
Vail v. Halton, 14 Ind. 344.....	182	Webb v. John Hancock, etc., Ins. Co., 162 Ind. 616.....	300
VanCleave v. Milliken, 13 Ind. 105.....	182	Wehmeier v. Mercantile Bank- ing Co., 49 Ind. App. 454	.....58, 542
Vandalla R. Co. v. Stillwell, 181 Ind. 267.....	589, 590	Welch v. State, ex rel., 164 Ind. 104.....	160
Vincennes Water Co. v. White, 124 Ind. 376.....	483, 484	— v. Wilcox, 101 Mass. 162.....	638
Virgin v. Lake Erie, etc., R. Co., 55 Ind. App. 216.....	137, 139, 146, 433, 516, 517	Welden v. Philadelphia, etc., R. Co., 2 Pen. (Del.) 1.....	392
Voris v. Shotts, 20 Ind. App. 220.....	480	Wells v. New England Mut. Life Ins. Co., 191 Pa. St. 207.....	8
Voss v. Capital City Brew. Co., 48 Ind. App. 476.....	200	— v. Vandalla R. Co., 56 Ind. App. 211.....	275, 277, 281
— v. Eller, 109 Ind. 260.....	184	— v. Vermont Ins. Co., 28 Ind. App. 620.....	526
Vulcan Iron, etc., Co. v. Electric, etc., Min. Co., 54 Ind. App. 28.....	425	Wells, Fargo & Co. v. Nie- man-Marcus Co., 227 U. S. 469.....	335
Wabash R. Co. v. Barrett, 117 Ill. App. 315.....	691	Westhafer v. Patterson, 120 Ind. 459.....	612
		Wheeler v. City of Detroit, 127 Mich. 329.....	624
		Wheeling, etc., R. Co. v. Har- vey, 77 Ohio St. 235.....	400, 406

Whitcomb v. Phoenix Mut. Life Ins. Co., 29 Fed. Cas. No. 17,530.....	305	Winer v. Mast, 146 Ind. 177.....	422
White v. Clawson, 79 Ind. 188.....	181	Wittenbrock v. Parker, 102 Cal. 93.....	324
— v. McKeesport, 101 Pa. St. 394.....	241	Witty v. Michigan Mut. Life Ins. Co., 123 Ind. 411.....	704
— v. Stanton, 111 Ind. 540.....	180	Wm. Deering & Co. v. Armstrong, 18 Ind. App. 687.....	328
— v. Sun Pub. Co., 164 Ind. 420.....	465	Wood v. Beasley, 107 Ind. 37.....	286
Whitten v. New England, etc., Ins. Co., 165 Mass. 343.....	422	— v. Leadbitter, 13 M. & W. *838.....	393
Whorley v. Karper, 20 Pa. Super. Ct. 347.....	270	— v. Robertson, 113 Ind. 323.....	288
Widner v. West End St. R. Co., 158 Mass. 49.....	226	Woolwine v. Chesapeake, etc., R. Co., 36 W. Va. 329.....	394, 404
Willcox v. Alexander, 32 S. W. (Tex.) 561.....	202	Woodworth v. Veitch, 29 Ind. App. 589.....	400
Willcuts v. Northwestern, etc., Ins. Co., 81 Ind. 300.....	526	Worden v. Witt, 95 Am. St. 70, note.....	662
Willey v. Strickland, 8 Ind. 453.....	343	— v. —, 4 Idaho 404.....	670
William Laurie Co. v. McCullough, 174 Ind. 477.....	26	Worman v. Minich, 28 Ind. App. 31.....	316
Williams v. Butler, 58 Ind. App. 47.....	201	Wright v. Boston, etc., R. Co., 142 Mass. 296.....	392
— v. Frybarger, 9 Ind. App. 558.....	156	— v. Tichenor, 104 Ind. 185.....	356
— v. Western Union R. Co., 50 Wis. 71.....	355	— v. Wilson, 98 Ind. 112.....	337
Williamson v. Yingling, 80 Ind. 379.....	653	Wuotilla v. Duluth Lumber Co., 37 Minn. 153.....	316
Wills v. Ross, 77 Ind. 1.....	157	Young v. Clark, 16 Utah 42.....	398
Wilson v. Brookshire, 126 Ind. 497.....	183	— v. Harvey, 16 Ind. 314.....	407
— v. City of St. Joseph, 130 Mo. App. 557.....	624	Zenor v. Pryor, 57 Ind. App. 222.....	257, 341, 344
— v. Johnson, 145 Ind. 40.....	660	Ziegler v. Powell, 54 Ind. 173.....	66
Windfall, etc., Oil Co. v. Roe, 41 Ind. App. 687.....	189	Zink v. Zink, 56 Ind. App. 677.....	160
— v. Terwilliger, 152 Ind. 364.....	356, 357	Zirinsky v. Post, 112 App. Div. 74.....	456
		Zoebisch v. Von Minden, 47 Hun (N. Y.) 213.....	111
		Zonker v. Cowan, 84 Ind. 395.....	423

STATUTES CITED AND CONSTRUED

Constitution, Art. 1, §20.....	247
Constitution, Art. 7, §14.....	343
34 Stat. at Large 584.....	334
U. S. Comp. Stat. Supp. 1911 p. 1288.....	334
Section 273 Burns 1914.....	637
Section 295 Burns 1914.....	180
Section 338 Burns 1914.....	698
Section 339 Burns 1914.....	95
Section 343a Burns 1914.....	536
Section 344 Burns 1914.....	14, 276, 279, 353, 477, 507, 530
Section 348 Burns 1914.....	477, 509
Section 350 Burns 1914.....	425
Section 362 Burns 1914.....	479, 626
Section 364 Burns 1914.....	275
Section 370 Burns 1914.....	144
Sections 400-403 Burns 1914.....	435
Section 407 Burns 1914.....	425, 500, 656
Section 427 Burns 1914.....	608
Sections 428-431 Burns 1914.....	608
Section 502 Burns 1914.....	424
Section 577 Burns 1914.....	676
Section 585 Burns 1914.....	465
Section 587 Burns 1914.....	328
Section 656 Burns 1914.....	472
Section 671 Burns 1914.....	542, 677
Section 674 Burns 1914.....	440, 444, 445, 446, 447
Section 681 Burns 1914.....	440, 443
Section 696 Burns 1914.....	221, 275
Section 700 Burns 1914.....	425, 435, 656
Section 706 Burns 1914.....	337
Section 707 Burns 1914.....	337
Sections 956, 978 Burns 1914.....	233
Section 1392 Burns 1914.....	542
Section 1707 Burns 1914.....	343
Section 1708 Burns 1914.....	343
Section 2769 Burns 1914.....	369
Section 2842 Burns 1914.....	454, 457
Section 3061 Burns 1914.....	369
Section 3063 Burns 1914.....	369
Section 3085 Burns 1914.....	343
Section 3123 Burns 1914.....	285, 287
Section 3413 Burns 1914.....	76
Section 3965 Burns 1914.....	343, 612
Section 5308 Burns 1914.....	276, 277, 278, 281
Section 5431 Burns 1914.....	133, 390
Section 5464 Burns 1914.....	113
Section 5465 Burns 1914.....	113
Section 5488 Burns 1914.....	113
Section 6410 Burns 1914.....	535
Sections 6449, 6451 Burns 1914.....	84
Sections 6584a, 6584b, 6584c Burns 1914.....	532, 533
Sections 7479, 7480 Burns 1914.....	43, 45
Section 7483 Burns 1914.....	45

xxx STATUTES CITED AND CONSTRUED.

Section 7686 Burns 1914.....	359, 360
Section 8020a Burns 1914.....	588, 589, 590
Section 8296 Burns 1914.....	32
Section 8297 Burns 1914.....	187
Section 8582 Burns 1914.....	590, 605
Section 8655 Burns 1914.....	240
Section 8700 Burns 1914.....	695, 698
Section 8704 Burns 1914.....	695, 696
Section 8705 Burns 1914.....	695
Sections 8710-8721 Burns 1914.....	240
Section 8722 Burns 1914.....	482
Section 8961 Burns 1914.....	240, 482
Section 8962 Burns 1914.....	619
Section 9062 Burns 1914.....	648
Section 9071 Burns 1914.....	460
Section 9111 Burns 1914.....	342
Section 9603 Burns 1914.....	343
Section 10393 Burns 1914.....	540
Section 10476c Burns 1914.....	570
Section 2435 Burns 1908.....	663
Section 5042 Burns 1908.....	255, 258
Sections 5195, 5236 Burns 1908.....	156
Section 7686 Burns 1908.....	359, 360, 361
Section 7687 Burns 1908.....	664
Section 7691 Burns 1908.....	664
Section 7719 Burns 1908.....	361
Section 7763 Burns 1908.....	663
Section 7775 Burns 1908.....	665
Section 7777 Burns 1908.....	663, 665
Section 7778 Burns 1908.....	664
Section 7779 Burns 1908.....	664
Section 7780 Burns 1908.....	663
Sections 7781, 7782 Burns 1908.....	664
Section 7784 Burns 1908.....	663
Section 8959 Burns 1908.....	483, 605
Section 10465 Burns 1908.....	570
Section 4357 Burns 1894.....	141
Section 272 R. S. 1881.....	637
Section 293 R. S. 1881.....	180
Section 333 R. S. 1881.....	698
Section 334 R. S. 1881.....	95
Section 345 R. S. 1881.....	425
Section 358 R. S. 1881.....	275
Section 364 R. S. 1881.....	144
Sections 391-394 R. S. 1881.....	435
Section 398 R. S. 1881.....	425, 500, 656
Section 479 R. S. 1881.....	424
Section 551 R. S. 1881.....	676
Section 559 R. S. 1881.....	465
Section 626 R. S. 1881.....	472
Section 632 R. S. 1881.....	542, 677
Section 640 R. S. 1881.....	440, 443
Section 655 R. S. 1881.....	221, 275
Section 658 R. S. 1881.....	425, 435, 500, 656
Section 664 R. S. 1881.....	337
Section 665 R. S. 1881.....	337
Sections 922, 943 R. S. 1881.....	223
Section 1421 R. S. 1881.....	343
Section 2252 R. S. 1881.....	369

STATUTES CITED AND CONSTRUED. xxxi

Section 2517 R. S. 1881.....	369
Section 2534 R. S. 1881.....	343
Section 2567 R. S. 1881.....	285, 287
Section 2933 R. S. 1881.....	343, 612
Section 3180 R. S. 1881.....	697
Section 3333 R. S. 1881.....	141
Sections 3903, 3907 R. S. 1881.....	156
Section 4020 R. S. 1881.....	133, 380
Section 4735 R. S. 1881.....	114
Sections 4920, 4921 R. S. 1881.....	43, 45
Section 4924 R. S. 1881.....	45
Section 5501 R. S. 1881.....	460
Section 5528 R. S. 1881.....	342
Section 6010 R. S. 1881.....	343
Local Laws, 1832 p. 173.....	154
Local Laws, 1848 p. 432.....	155
Acts 1869 (s. s.) p. 92.....	113
Acts 1875 (s. s.) p. 17.....	697
Acts 1877 p. 6.....	255, 258
Acts 1879 p. 201.....	141
Acts 1881 (s. s.) p. 482.....	114
Acts 1883 p. 156.....	454, 457
Acts 1889 p. 82.....	113
Acts 1889 p. 289.....	369
Acts 1899 p. 5.....	440, 444, 445, 446, 447
Acts 1899 p. 58.....	479, 626
Acts 1899 p. 231.....	594
Acts 1901 p. 336.....	540
Acts 1901 p. 448.....	84
Acts 1901 p. 514.....	535
Acts 1903 p. 223.....	113
Acts 1903 p. 343.....	608
Acts 1905 p. 122.....	343
Acts 1905 p. 219.....	240, 482, 483, 695, 696, 698
Acts 1905 p. 383.....	240
Acts 1905 p. 521.....	359, 360, 361, 663, 664, 665
Acts 1905 p. 584.....	663
Acts 1907 p. 46.....	276, 277, 278, 281
Acts 1907 p. 68.....	361
Acts 1907 p. 108.....	608
Acts 1907 p. 167.....	240, 241
Acts 1907 p. 174.....	76
Acts 1907 p. 208.....	664
Acts 1907 p. 237.....	542
Acts 1907 p. 249.....	619
Acts 1907 p. 334.....	599, 605
Acts 1907 p. 371.....	663
Acts 1907 p. 374.....	664
Acts 1907 p. 550.....	240, 241
Acts 1907 p. 558.....	570
Acts 1909 p. 173.....	84
Acts 1909 p. 295.....	32, 187
Acts 1909 p. 412.....	240, 241, 695
Acts 1911 p. 145.....	507, 588, 589, 590
Acts 1911 p. 415.....	14, 276, 279, 353, 477, 509, 530
Acts 1911 p. 421.....	359, 360
Acts 1913 p. 66.....	648
Acts 1913 p. 331.....	532, 533
Acts 1913 p. 848.....	328
Acts 1913 p. 850.....	536

TEXT-BOOKS CITED

6 Am. and Eng. Ency. Law 530, 531.....	355	24 Cyc. 1340.....	202
28 Am. and Eng. Ency. Law 309.....	511	25 Cyc. 874, 875.....	7
6 Am. and Eng. Ency. Law (2d ed.) 395.....	111	26 Cyc. 1156.....	553
11 Am. and Eng. Ency. Law (2d ed.) 930.....	94	27 Cyc. 1225, 1226.....	324
14 Am. and Eng. Ency. Law (2d ed.) 1112.....	156	28 Cyc. 1282.....	484
15 Am. and Eng. Ency. Law (2d ed.) 906.....	111	28 Cyc. 1469, 1470.....	619
18 Am. and Eng. Ency. Law (2d ed.) 1136, 1137.....	404	29 Cyc. 133, 135-137.....	259
2 Bacon, Ben. Soc. and Life Ins. (3d ed.) §§320, 339....	7	29 Cyc. 1057.....	144
— §323.....	9	29 Cyc. 1113.....	300
— §434a.....	302	29 Cyc. 1502.....	604
1 Bailey, Personal Injuries §§852, 857.....	316	32 Cyc. 157.....	371
1 Beach, Contracts §32.....	109	33 Cyc. 38.....	363
— §231.....	202	33 Cyc. 166, 167.....	355
Bishop, Contracts §§603, 860.....	202	33 Cyc. 736.....	691
Black, Law & Pr. in Accident Cases §13.....	394	33 Cyc. 738.....	690
2 Black, Judgments (2d ed.) §780.....	59	36 Cyc. 1131.....	362
Campbell, Negligence §§32, 33.....	394	36 Cyc. 1505.....	690
3 C. J. 446, 447, 448, 492.....	676	38 Cyc. 106.....	499
Cooley, Mun. Corp. §87.....	241	1 Daniel, Negotiable Inst. (3d ed.) §108.....	400
Cooley, Torts (3d ed.) 756, 757.....	667	1 Daniel, Negotiable Inst. (6th ed.) §65.....	459
3 Cyc. 432, 435.....	511	3 Dillon, Mun. Corp. (5th ed.) §1030.....	486
4 Cyc. 935.....	459	— §§1044, 1045.....	697
6 Cyc. 648.....	580	1 Edwards, Bills and Notes (3d ed.) 187, 188.....	459
7 Cyc. 609.....	460	Elliott, App. Proc. §91.....	677
9 Cyc. 562, 563.....	111	2 Elliott, Contracts §1537.....	269
13 Cyc. 78.....	206	5 Elliott, Contracts §§4185, 4186.....	75
13 Cyc. 363.....	319	3 Elliott, Railroads (2d ed.) §§1166a, 1167.....	691
14 Cyc. 1208.....	639	— §1174.....	571
15 Cyc. 259.....	60	— §1306.....	554
16 Cyc. 905.....	201	1 Elliott, Roads and Sts. (3d ed.) §339.....	241
18 Cyc. 312.....	203	— §§306, 307, 308.....	697
18 Cyc. 580.....	93	2 Elliott, Roads and Sts. (3d ed.) §857.....	609
20 Cyc. 1360.....	156	Ewbank's Manual §131.....	275
24 Cyc. 196.....	247, 248	— §154.....	445
24 Cyc. 276.....	520	2 Ency. Evidence 475.....	459
24 Cyc. 429.....	344	8 Ency. Evidence 815, 819- 823.....	142
24 Cyc. 923.....	206	9 Ency. Evidence 2.....	144
24 Cyc. 963, 968, 970, 1063....	204	11 Ency. Evidence 44.....	470
24 Cyc. 1050.....	200	18 Ency. Pl. and Pr. 123.....	511
		3 Graham & Waterman, New Trials 1162.....	511

TEXT-BOOKS CITED.

xxxiii

Greenhood, Public Policy 141, 142.....	105	Schouler, Executors and Ad- ministrators §223.....	203
1 Greenleaf, Evidence §275..	109	Sedgwick, Damages (6th ed.) 765.....	511
Hale, Damages 235.....	511	2 Shearman & Redfield, Negli- gence (6th ed.) §340a.....	669
Jones, Landlord and Tenant §164.....	205	1 Story, Eq. Jurisp. (13th ed.) 384, 385.....	104
Jones, Evidence (2d ed.) §76..	156	1 Sutherland, Damages (2d ed.) §160.....	511
2 Jones, Evidence §411.....	110	2 Thompson, Negligence 984	554, 563
1 Joyce, Electricity (2d ed.) §445c.....	347	1 Thompson, Negligence (2d ed.) §75.....	691
4 Kent, Comm. 126.....	286	5 Thompson, Negligence (2d ed.) §§6392, 6397.....	668
Lawson, Presumptive Ev. 98..	459	— §6401.....	669
2 McQuillin, Mun. Corp. §§850, 859.....	142	2 Thompson, Trials §2303...	123
6 McQuillin, Mun. Corp. §2662	484	1 Thornton, Negligence §1207	216
— §2663.....	484, 486	— §§1222, 1223.....	215
2 Nellis, Street Railways (2d ed.) §516.....	602	Thornton, Oil and Gas (2d ed.) §§155, 238, 240.....	503
Norton, Bills and Notes (3d ed.) 73.....	460	— §332a.....	681
Patterson, Railway Accident Law §184.....	394	2 Thornton & Blackledge, Ad- ministration and Settlement of Estates §360.....	371
2 Pomeroy, Eq. Jurisp. §798..	494	Tiffany, Death by Wrongful Act (2d ed.) §§158, 159....	318
4 Pomeroy, Eq. Jurisp. §1212..	494	1 Tiffany, Landlord and Ten- ant 352.....	202
2 R. C. L. 42.....	876	— 921.....	205
2 R. C. L. 234.....	59	— 927, 932, 941.....	204
5 R. C. L. 36.....	580	— 1147.....	200
		1 Wharton, Evidence (3d ed.) §§154, 161.....	425

CASES DECIDED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1914, AND MAY
TERM, 1915, IN THE NINETY-NINTH YEAR .
OF THE STATE.

MODERN WOODMEN OF AMERICA v. YOUNG.

[No. 8,560. Filed May 13, 1915.]

1. **INSURANCE.—Life Insurance.—Rescission.—Return of Premiums.**
—*Pleading.*—Where a warranty contained in an application for life insurance is in fact false, and the contract provides that a breach of warranty shall render it void and all premiums paid shall be deemed forfeited, the courts will treat the contract as voidable merely, and the insurer, in order to avoid liability thereunder, must act with reasonable promptness to that end on learning of the breach of the warranty, by rescinding the contract and making a return or tender of all premiums received by it thereunder, and in pleading such rescission a return or tender of the premiums must be alleged. p. 4.
2. **INSURANCE.—Life Insurance.—Rescission.—Return of Premiums.**
—*Pleading.*—Where a policy of insurance provided that it would become null and void if the insurer acquired the habit of intemperate use of alcoholics, such specification was in the nature of a condition subsequent, or a promissory warranty, which would merely render the policy voidable if the insured became habitually intemperate, and, as in case of a breach of a warranty occurring simultaneously with the making of the warranty, will be treated as waived, in the absence of a rescission by the insurer within a reasonable time after learning the facts, accompanied by a return or tender of the premiums, except that a return or tender need only be made of the premiums received after the breach; hence an answer based on such breach must allege a rescission and return or tender of the premiums. p. 5.
3. **INSURANCE.—Life Insurance.—Rescission.—Return of Premiums.**
—Where a contract of insurance provides that it shall be void

Modern Woodmen, etc. v. Young—59 Ind. App. 1.

if the death of insured results from the use of intoxicating liquors, or in consequence of the violation of law, no return of premiums paid to the insurer is necessary in order to avoid liability for a death occurring from either cause. p. 6.

From Knox Circuit Court; *B. M. Willoughby*, Judge.

Action by Martha M. Young against the Modern Woodmen of America. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Benjamin D. Smith and *Cullop & Downey*, for appellant.
Harry R. Lewis and *James M. House*, for appellee.

CALDWELL, P. J.—This action is based on a benefit certificate, issued under date of November 27, 1899, by appellant to G. W. Young, as a beneficiary member of a local camp in Illinois. The certificate names appellee as beneficiary. Young died in Illinois on September 7, 1910. Appellant is a fraternal beneficiary society, organized under the laws of the state of Illinois. The contract of insurance consists of the written application, the certificate and the by-laws of the association. The complaint is not challenged. The answer is in three paragraphs, each based on a specified provision of the contract. Such provisions are contained in the certificate and in the by-laws, and are properly pleaded. The provisions of the certificate, so far as material, are as follows:

“If the member holding this certificate shall * * * become intemperate in the use of alcoholic drinks * * * or if his death shall occur in consequence * * * of any violation or attempted violation of the laws of any state or territory of the United States, then this certificate shall be null and void, and of no effect, and all moneys which have been paid, and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited, and this certificate shall be null and void.”

The material provisions of the by-law involved are as follows:

“If any member of this society * * * shall become intemperate in the use of intoxicating liquors

* * * or if his death shall result directly or indirectly from his use of intoxicating liquors * * * then the certificate held by said member shall by such acts become and be absolutely null and void, and all payments made thereon shall be thereby forfeited."

The first paragraph of answer alleges in substance that Young, prior to his death became and was intemperate in the use of intoxicating liquors. This allegation is contained also in the second paragraph, and in addition, there is an averment to the effect that Young's death resulted from the use of intoxicating liquors, in that, on September 7, 1910, while in an intoxicated condition, caused by the intemperate use of intoxicating liquors, he was killed by one Cardinal, while defending himself from an unlawful assault committed upon him by Young. The third paragraph contains an allegation to the effect that the death of Young occurred in consequence of the violation by him of the laws of the state of Illinois, in that at a named place in that state on September 7, 1910, he committed an unlawful assault on Cardinal with a deadly weapon, with the intent to murder him, and that Cardinal thereupon killed Young while in defense of his person against such assault. This paragraph properly pleads the statutes of Illinois defining the respective crimes of assault, assault and battery, assault with intent to commit murder, and assault with a deadly weapon. Appellant filed also an answer in general denial. Appellee, without testing the sufficiency of the special paragraphs of answer, filed thereto a reply in general denial.

At the trial before a jury, some evidence was heard, without objection, in support of the allegation of the first paragraph of answer—that Young subsequent to the issuing of the certificate became addicted to the excessive use of alcoholics. All offered evidence, however, which, if admitted, would have tended to establish the distinctive features of the second and third paragraphs of answer, as herein outlined, was excluded. The court directed the trial on the theory, as appears from the record that neither para-

graph of special answer stated sufficient facts to constitute a defense, and that as a consequence, the only issue for trial was that formed by the complaint and the general denial filed in answer thereto. It was assumed that it was necessary to the sufficiency of each of the special paragraphs of answer that it contain averments that appellant, when it learned of the events and occurrences pleaded by such paragraphs respectively, as in avoidance of the cause of action, elected to rescind and did rescind the contract, and that as an essential step in so doing, it returned or tendered all premiums and assessments that had been received thereunder.

This case must be distinguished from those involving a warranty made at the inception of the contract, and relating to some existing or past fact or transaction. In such

1. a case where the matter warranted to be true is in fact false, the making of the warranty and its breach are simultaneous. Under such circumstances, where some instrument constituting part of the contract provides that a breach of such warranty shall render the policy or certificate void, and that all premiums or assessments received thereunder shall be forfeited, the rule is firmly established in this State that thereby the policy or certificate becomes voidable rather than void. The warranty feature of the contract is regarded as made for the benefit of the insurer, and that as a consequence he may waive it. In such a case, the insurer may at his election avoid the policy or certificate, and rescind the contract, provided he acts with reasonable promptness to that end on acquiring knowledge of the fact of such breach of warranty, but a necessary step in such rescission is a return or tender of all premiums or assessments that have been received under the contract. In such a case, if suit is brought on the policy or certificate, an answer to the complaint based on such breach of warranty must allege all the facts constituting such rescission, including a return or tender of the premiums. Among the

Modern Woodmen, etc. v. Young—59 Ind. App. 1.

many cases that might be cited are the following: *American Cent. Life Ins. Co. v. Rosenstein* (1910), 46 Ind. App. 537, 92 N. E. 380; *Metropolitan Life Ins. Co. v. Johnson* (1912), 49 Ind. App. 233, 94 N. E. 785; *United States, etc., Ins. Co. v. Clark* (1908), 41 Ind. App. 345, 83 N. E. 700; *Modern Woodmen, etc. v. Vincent* (1907), 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475, 14 Ann. Cas. 89. The contract becomes susceptible to annulment by reason of the breach of warranty. On the exercise of the right to rescind by reason of such breach, where such warranty and breach date from the inception of the contract, it follows that the effect of the rescission reaches back to the breach and annuls the contract *ab initio*. It is apparent in such case that since the return or tender of the premiums or assessments is an essential step in rescinding, such return or tender must be as broad as the rescission. If the facts be such that a rescission, if made, must reach back to the inception of the contract, all premiums received under the contract must be returned or tendered in order that there may be a rescission. The provision of the contract relating to the forfeiture of premiums and assessments under such circumstances itself becomes of no effect. Being a part of the contract, it is annulled with it. *Commercial Life Ins. Co. v. Schroyer* (1911), 176 Ind. 654, 657, 95 N. E. 1004, Ann. Cas. 1914 A 968; *Washburn v. Union Central Life Ins. Co.* (1914), 143 Ala. 485, 38 South. 1011.

Here, however, the first paragraph of answer is based on the violation of that specification of the certificate and by-law relating to the acquiring of the habit of the

2. intemperate use of alcoholics. Such specification is in the nature of a condition subsequent or a promissory warranty. There could not be and is not alleged to have been a breach of it until sometime after the inception of the contract. Such a breach also might be waived by the insurer, and therefore on its occurrence, the contract was thereby rendered voidable at the election of the insurer,

rather than void. In such a case and for like reasons, a return or tender of the premiums or assessments received would be essential to a rescission based on the breach as under the circumstances involved in the line of cases first above cited. But here such breach affected the contract only from its occurrence, which was subsequent to the making of the contract, and a rescission in its effect would relate only to that date. It follows that here also a return or tender of premiums or assessments was an essential step in such rescission, but appellant in so rescinding was required to return or tender only the premiums or assessments received after the breach. *Supreme Tribe, etc. v. Lennert* (1912), 178 Ind. 122, 131, 98 N. E. 115. It is now apparent that the first paragraph of answer is insufficient by reason of the absence of an allegation to the effect that appellant, on acquiring knowledge of such breach, elected to and did rescind the contract, and in so doing that it returned or tendered the premiums received after the breach.

Turning our attention to the second and third paragraphs of answer, facts are alleged in the former to the effect that

Young's death resulted from his use of intoxicating

3. liquors. By the terms of said by-law, death so resulting rendered the certificate void. Facts are alleged in the third paragraph that the death of Young occurred in consequence of a violation of the laws of the state of Illinois. By the terms of the certificate, death so occurring rendered it void. Under each of these circumstances, it cannot be ascertained that the particular provision of the contract is applicable until death has occurred—that is, the consummated violation of the particular condition of the contract, if such expression is legitimate, occurs simultaneously with the death of the insured. The contract then has terminated at least for all purposes except enforcement. The contract required no further payment of premiums or assessments. If death so resulting or occurring be deemed a breach of the particular condition of the contract, and if it should be

said that the principle is applicable which requires that premiums and assessments be returned and tendered in order that a defense may be made on that ground, then, as has been said, only the premiums and assessments received since the breach are required to be returned. The nature of the case is such, however, that the obligation to pay premiums or assessments terminated at the death of the insured, and it would, therefore, be presumed that none had thereafter been paid, and hence that none are to be returned.

The contract here, in its effect, does not differ materially from those specifying that nothing is to be paid if death results from certain causes or from certain causes within a designated period. In such cases, the courts regard the insurance as of a limited nature, and that death from the excepted causes or from such causes within the period specified, is not included within the contract of insurance. In such cases, the courts hold that the risk having attached, the contract has been and is valid as to death from all other causes, and beyond such period, and that the premiums have been paid in consideration of such insurance, and that consequently they have been earned. It follows that in such cases their return or tender is not a prerequisite to a defense of a suit on the policy. *Redmen, etc., Assn. v. Rippey* (1914), 181 Ind. 454, 103 N. E. 345, 104 N. E. 641, 50 L. R. A. (N. S.) 1006, note. See, also, as bearing on the question, the following: *Knights, etc., Ins. Order v. Shoaf* (1906), 166 Ind. 367, 77 N. E. 738; *Modern Woodmen, etc. v. Craiger* (1910), 175 Ind. 30, 92 N. E. 113, 93 N. E. 209; *Hodson v. Great Camp, etc.* (1911), 47 Ind. App. 113, 93 N. E. 861; 25 Cyc. 874, 875; 2 Bacon, Ben. Soc. and Life Ins. (3d ed.) §§320, 339; *Starr v. Aetna Life Ins. Co.* (1905), 4 L. R. A. (N. S.) 636, note; *Bloom v. Franklin Life Ins. Co.* (1884), 97 Ind. 478, 49 Am. Rep. 469; *Continental Life Ins. Co. v. Houser* (1887), 111 Ind. 266, 12 N. E. 479; *Continental Life Ins. Co. v. Houser* (1883), 89 Ind. 258; *Northwestern, etc., Ins. Co. v. Hazelett* (1886), 105 Ind. 212, 4

N. E. 582, 55 Am. Rep. 192; *Conboy v. Railway, etc., Accident Assn.* (1897), 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. 154; *Blackstone v. Standard Life, etc., Co.* (1889), 3 L. R. A. 486, note; *Darrow v. Family Fund Society* (1889), 6 L. R. A. 495, note; *Supreme Lodge, etc. v. Bradley* (1904), 73 Ark. 274, 83 S. W. 1055, 108 Am. St. 38, 67 L. R. A. 770, 3 Ann. Cas. 872; *Wells v. New England Mut. Life Ins. Co.* (1899), 191 Pa. St. 207, 43 Atl. 126, 71 Am. St. 763, 53 L. R. A. 327.

In *Dickerson v. Northwestern Mut. Life Ins. Co.* (1902), 200 Ill. 270, 277, 65 N. E. 694, the policy provided that, if within two years from its date, the insured should die by his own hand, the policy should be null and void and all payments forfeited. The insured committed suicide before the expiration of the insurance purchased by one quarterly payment. It was there held that the insurer was not bound, before relying on the defense of suicide, to declare the policy void and tender back the premiums. The court said: "Counsel refers to cases where policies have been rescinded for fraud or false representations in procuring them, but such cases have no application here. Of course, where the insurance company seeks to rescind and declare the contract void *ab initio*, it must, as in all cases of rescission, place the party in *statu quo*, because in such cases it would be inconsistent to claim that the policy was never in force, and at the same time retain the premiums paid as a consideration for a risk, which had never been assumed." Under somewhat similar circumstances, and where the insured committed suicide before the expiration of the time for which he had paid, the following language is used: "The contracts of insurance, when fairly and reasonably construed, show that death of the insured by suicide, sane or insane, was a risk not undertaken by the insurer at all. There is no merit in the contention that a return of the premiums paid by Kelly was a prerequisite to a defense by the insurance company. The company earned the premiums paid

by Kelly for the risk which it agreed to assume, and which it did assume and carry until Kelly's death. This risk embraced death from practically all other causes but suicide. Cases where fraud may have been so practiced in the negotiations as to render the contract voidable at the instance of the company, or cases where no risk at all ever attached, are totally inapplicable to the facts disclosed in this case." *Mutual Life Ins. Co. v. Kelly* (1902), 114 Fed. 268, 280, 52 C. C. A. 154, See, also, *Phoenix Ins. Co. v. Stevenson* (1879), 78 Ky. 150; *Davison v. London, etc., Ins. Co.* (1899), 189 Pa. St. 132, 42 Atl. 2; *Farmers Mut. Ins. Co. v. Home Fire Ins. Co.* (1898), 54 Neb. 740, 74 N. W. 1101; *Colby v. Cedar Rapids Ins. Co.* (1885), 66 Iowa 577; 2 Bacon, Ben. Soc. and Life Ins. (3d ed.) §323. We hold that an allegation of a return or tender of premiums or assessments was not necessary to the sufficiency of the second and third paragraphs of answer, and that the court consequently erred in excluding the offered evidence.

There is some confusion in the record respecting the christian name of Cardinal, in conflict with whom it is alleged Young lost his life. Notwithstanding this confusion, the error is presented.

The judgment is reversed with instructions to sustain the motion for a new trial, and with permission to reform the pleadings if desired.

NOTE.—Reported in 108 N. E. 869. As to conflict of laws in respect to nonforfeiture of life policies, see 104 Am. St. 483. As to the duty of insured to negative death or accident from excepted cause. see 4 L. R. A. (N. S.) 636; 50 L. R. A. (N. S.) 1006. As to return of premiums as condition of cancellation by virtue of cancellation clause, see 13 L. R. A. (N. S.) 884. See, also, under (1) 29 Cyc. 227, 66, 185; (2) 29 Cyc. 227, 185; (3) 29 Cyc. 194.

VANDALIA RAILROAD COMPANY v. HOUSE.

[No. 8,587. Filed May 13, 1915.]

1. **APPEAL.—Review.—Findings.**—In an action for injunction and for damages resulting from the casting of surface water onto plaintiff's land, a finding for plaintiff can not be disturbed on the theory that the evidence shows that defendant had acquired a prescriptive right to discharge the water on plaintiff's land, where it is doubtful if the evidence shows more than a permissive use and the testimony is conflicting as to the number of years such use continued. p. 11.
2. **APPEAL.—Review.—Evidence.—Sufficiency.**—Where the evidence is conflicting, the court on appeal will consider only that which supports the finding or verdict, and if that evidence is sufficient, the finding or verdict will not be disturbed. p. 12.
3. **WATERS AND WATERCOURSES.—Surface Waters.—Damage to Fee.—Complaint.**—In an action for injunction and for damages from the flow of surface water, a complaint alleging injury by washing and digging out a ditch and by washing and digging out the land shows a permanent injury to the fee, and is sufficient to entitle plaintiff to damages for injury to the fee of his lands. p. 12.
4. **APPEAL.—Review.—Disposition of Cause.—Amendment Deemed Made.**—Where evidence showing a permanent injury to the fee of plaintiff's land was admitted without objection, the court on appeal, as against the objection made for the first time that the complaint does not warrant the allowance of damages for injury to the fee, will treat the complaint as having been amended in the trial court, if such amendment is necessary to sustain the judgment. p. 12.

From Knox Circuit Court; *B. M. Willoughby*, Judge.

Action by James M. House against the Vandalia Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Pickens & Pickens and *John G. Williams*, for appellant.

Wm. H. Hill and *James M. House*, for appellee.

IBACH, J.—In the first paragraph of his complaint against appellant, a railroad company, appellee averred that he was the owner in fee of certain lands in donation 143, Knox County, Indiana, through which appellant had a right of way, that appellant had collected surface waters from its

lands in artificial channels and conducted them on appellee's lands, causing a great ditch to be dug and washed out on his lands, to his damage; that appellant would continue to cast waters so collected upon his lands at each recurring rain or season of wet weather, to his damage and injury, unless restrained from so doing. He asked for damages and an injunction. His second paragraph of complaint averred similar facts relating to lands owned by appellee in donation 147, Knox County.

The court found the facts substantially as alleged in the first paragraph of complaint, including findings that a large ditch had been washed out on appellee's lands, and that the waters after reaching the foot of a hill through said large ditch, spread out over and damaged three acres of bottom land. It found that the rental value of the lands was thereby lessened, and that the fee was also damaged, and rendered conclusions of law allowing damages to appellee for loss of rental value, and for damages to the fee, and enjoining appellant permanently from collecting and throwing surface water on appellee's lands. Substantially the same findings and conclusions of law were made as to the second paragraph of complaint.

It is first argued by appellant that the finding as to the first paragraph of complaint is not sustained by sufficient evidence and is contrary to law, because the evidence

1. shows that the water complained of had flowed in the same manner for more than twenty years and thus appellant acquired prescriptive rights to discharge surface water from its right of way on appellee's lands. But on this point, the evidence is conflicting. The testimony of appellant's witnesses would tend to show that the water had been collected and thrown on appellee's lands in the same manner for a length of time sufficient to acquire prescriptive rights, but it is doubtful even if this evidence, given its full effect, would show more than a permissive use, and we scarcely think it could be said to show such a continuous, unin-

terrupted, adverse use under a claim of right, as is necessary to establish a prescriptive right to turn surface waters on the lands of another. *Cleveland, etc., R. Co. v. Huddleston* (1899), 21 Ind. App. 621, 628, 52 N. E. 1008, 69 Am. St. 385; *Clay v. Pittsburgh, etc., R. Co.* (1905), 164 Ind. 439, 445, 73 N. E. 904. However, the testimony of appellee is that the conditions as to the flowage of the waters complained of existed only eight or ten years, and that they did not exist fifteen or twenty years before the time of the trial. This evidence standing alone is sufficient to support the court's finding. Where evidence is conflicting, this

2. court must consider only that which supports the finding or verdict, and if as in this case, that evidence is sufficient, the finding or verdict will not be disturbed.

It is also argued that the court erred in its findings of fact and conclusions of law for the reason that appellee is not entitled to recover damages for injury to the

3. fee of his real estate. It is said that he should not recover such damages, because damage to the fee is not alleged in the complaint. In this, appellant is mistaken, for the first paragraph of complaint alleges injury by washing and digging out a ditch, and the second paragraph by washing and digging out the land. This is permanent injury, injury to the fee, and the complaint is sufficient to entitle appellee to damages for injury to the fee of his lands. *Southern R. Co. v. Friedly* (1913), 52 Ind. App. 192, 100 N. E. 481; *Louisville, etc., R. Co. v. Sparks* (1895), 12 Ind. App. 410, 40 N. E. 546. Further, appellant made no objection to evidence of permanent damages going

4. before the court, and the state of the record is such that, were it necessary to permit amendment of the complaint before judgment rendered for damages to the fee, the amendment is such as should have been granted in the lower court if asked, and as against an objection raised here for the first time, this court will deem it amended. Judgment affirmed.

Clevenger v. Clevenger—59 Ind. App. 13.

NOTE.—Reported in 108 N. E. 872. As to right of flowage and liability for injury to property by same, see 57 Am. Dec. 684. See, also, under (1) 3 Cyc. 360; (2) 3 Cyc. 348, 360; (3) 40 Cyc. 653; (4) 3 Cyc. 291.

CLEVENGER v. CLEVENGER ET AL.

[No. 8,617. Filed May 13, 1915.]

APPEAL.—Questions Reviewable.—Ruling on Demurrers.—No question is presented on the overruling of demurrers to certain paragraphs of answer, where neither appellant's brief nor the record discloses that a memorandum of defects was filed with such demurrers, as required by §344 Burns 1914, Acts 1911 p. 415.

From Delaware Circuit Court; *Frank Ellis*, Judge.

Action by Merrell W. Clevenger against Naomi C. Clevenger and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

William A. Thompson and *Richard W. Sprague*, for appellant.

Joseph G. Leffler, *Walter L. Ball* and *A. E. Needham*, for appellees.

FELT, J.—On May 22, 1911, appellant filed, in the court below, his complaint in one paragraph to quiet title to certain real estate. To this complaint appellees, David Cooper, Sarah E. Cooper and Naomi C. Clevenger, filed a general denial and a second paragraph of affirmative answer. The Coopers also filed a separate second paragraph of affirmative answer. Other pleadings were filed but we need not indicate them here. To each of the above second paragraphs of answer, appellant demurred for want of facts to constitute a defense to his complaint. Each of said demurrers was overruled, and appellant refusing to plead further, appellees withdrew their names in general denial and the court rendered judgment on the pleadings.

The only errors assigned seek to question the ruling on

McKinzie v. Fisher Gibson Co.—59 Ind. App. 14.

each of said demurrers. The demurrers are set out in appellant's brief, but neither in the record, nor in the brief, is there any memorandum as required by the act of 1911. Acts 1911 p. 415, §344 Burns 1914. No question is therefore presented. *Quality Clothes Shop v. Keeney* (1915), 57 Ind. App. 500, 106 N. E. 541; *Pittsburgh, etc., R. Co. v. Home Ins. Co.* (1915), 183 Ind. 355, 108 N. E. 525; *Stiles v. Hasler* (1914), 56 Ind. App. 88, 104 N. E. 878. Judgment affirmed.

NOTE.—Reported in 108 N. E. 868. See, also, 2 Cyc. 1014; 3 Cyc. 158.

MCKINZIE ET AL. v. THE FISHER GIBSON COMPANY.

[No. 8,619. Filed May 13, 1915.]

1. **APPEAL.—Review.—Evidence.—Sufficiency.**—In an action against a husband and wife to recover for automobile supplies sold and delivered to a garage alleged to have been operated by defendants, evidence showing that the wife had been the owner of a farm which had been deeded to her by her husband without consideration, and which, through the negotiations of her husband, was traded for the garage, which was taken over and held in her name, was sufficient to support a finding and judgment against the wife alone. p. 15.
2. **APPEAL.—Evidence.—Weight and Sufficiency.**—The court on appeal will not weigh the evidence, and, in determining its sufficiency to support the finding, will consider only that portion which is favorable to appellee. p. 15.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action by The Fisher Gibson Company against Eva McKinzie and another. From a judgment for plaintiff, the defendant named appeals. *Affirmed.*

William Booth, for appellant.

Shirts & Fertig, for appellee.

SHEA, J.—Action by The Fisher Gibson Company against appellants to recover judgment on an open account for \$225.43, for automobile supplies shipped and charged to

the "Auto Inn" at Marion, Indiana. The issues formed by appellants' answer in general denial to the complaint in one paragraph were tried by the court. There was a finding and judgment for appellee, against appellant Eva McKinzie in the sum demanded, and for appellant James McKinzie. The only error assigned for reversal is the overruling of appellant Eva McKinzie's motion for a new trial, in support of which it is urged: (1) that the finding and judgment of the court is not sustained by sufficient evidence; (2) that the finding and judgment of the court is contrary to law.

It is insisted on behalf of said Eva McKinzie that the Auto Inn was owned, managed and controlled exclusively by appellant James McKinzie, and that she had no

1. interest therein. The evidence discloses that appellant Eva McKinzie owned a farm in Jennings County, which had been deeded to her by her husband and co-appellant, it is claimed, without consideration. Her husband negotiated a trade of said farm for a garage in Marion, Indiana. McKinzie thinks he paid some money in addition, but is not certain about it, and does not know how much. When the trade was consummated, Eva McKinzie went to Marion, and executed a deed for the Jennings County land to the other parties to the trade. She admits in her cross-examination that the Auto Inn was in her name, but claims that she had nothing to do with the management thereof. It is undisputed that some kind of writing was drawn up, passing title in the garage to Eva McKinzie. She was in and about the garage during the time it was claimed to be managed and operated by her husband. These facts are some evidence upon which the court might very well rest a finding and judgment. That this court will not

2. weigh the evidence, and will not disturb the judgment of the lower court when there is some evidence to support it, is too well settled to need citation of authority. In determining this question, the court on appeal will con-

Lutz v. Cleveland, etc., R. Co.—59 Ind. App. 16.

sider only the evidence most favorable to appellee. *Ohio Valley Buggy Co. v. Anderson Forging Co.* (1907), 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045; *McReynolds v. Smith* (1909), 172 Ind. 336, 86 N. E. 1009; *Warner v. Jennings* (1909), 44 Ind. App. 574, 89 N. E. 908.

There is sharp conflict in the evidence, but we are convinced from an examination of the record that the trial court which saw the witnesses, and observed their conduct and manner on the witness stand, is the best judge of their credibility, and the weight to be given to their testimony. We find no reversible error presented. Judgment affirmed.

NOTE.—Reported in 108 N. E. 867. As to delivery of property and when it does not amount to sale so as to pass title, see 120 Am. St. 868. See, also, under (1) 35 Cyc. 572; (2) 3 Cyc. 360.

LUTZ, ADMINISTRATOR v. THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 8,512. Filed May 13, 1915.]

1. APPEAL.—*Ruling on Motion for Judgment on Answers to Interrogatories.*—*Scope of Review.*—In determining whether the trial court erred in sustaining a motion for judgment on the jury's answers to interrogatories notwithstanding the general verdict, the court on appeal is confined to a consideration of the facts pleaded, the answers to the interrogatories, and the general verdict. p. 18.
2. TRIAL.—*Answers to Interrogatories.*—*Conflicting Answers.*—Conflicting answers to interrogatories submitted to the jury nullify each other and have no controlling influence against the verdict. p. 23.
3. RAILROADS.—*Crossing Accidents.*—*Contributory Negligence.*—*Answers to Interrogatories.*—In an action for the death of a person killed at a railroad crossing, the burden on the question of contributory negligence was on defendant, and, since the verdict was a finding for plaintiff on that issue, the answers of the jury to interrogatories on that subject, to be sufficient to overcome the verdict, must be such as to affirmatively show a state of facts which compels the conclusion that decedent was guilty of negligence contributing to her injury and death, regardless of any evidence that might have been introduced tending to support

Lutz v. Cleveland, etc., R. Co.—59 Ind. App. 16.

the verdict, or tending to explain such answers and reconcile them with the verdict. p. 23.

4. RAILROADS.—*Crossing Accidents.*—*Contributory Negligence.*—

Whether a person killed in a railroad crossing accident was guilty of contributory negligence must be determined from all the facts and circumstances surrounding him at the time he was required to act, and from a consideration of whether, so circumstanced and situated, he exercised the kind and degree of care that would be used by an ordinarily prudent person. p. 23.

5. RAILROADS.—*Crossing Accidents.*—*Contributory Negligence.*—

Answers to Interrogatories.—In an action for the death of an old lady who was struck by defendant's train at a street crossing, where the answers to interrogatories did not dispute the finding of the general verdict that decedent looked and listened before attempting to cross the tracks, and neither heard nor saw any approaching train, but showed that after crossing the tracks she walked along the side thereof in the direction of the approaching train, and that the train, which was approaching at forty to fifty miles an hour, could then have been seen for a distance of 800 feet, were insufficient to overcome the general verdict on the ground of contributory negligence, in the absence of any finding as to how long decedent faced in the direction of the approaching train, or as to what caused her to face in that direction, the distance she walked parallel to the track, or where she was when she first saw the train, and in view of her advanced age, the facts and circumstances surrounding her at the time, and the fact that evidence might have been introduced that would have completely exonerated her from any inference of contributory negligence. p. 23.

6. DEATH.—*Verdict.*—*Damages.*—*Pecuniary Loss.*—In an action for the death of a person killed by a train at a crossing, answers by the jury to interrogatories that there was "no evidence" as to what was the actual pecuniary loss to decedent's children by reason of decedent's death, and as to what the items, if any, of such pecuniary loss were, were not equivalent to a finding that there was no pecuniary loss, and were not in conflict with the general verdict for plaintiff. p. 25.

From Clark Circuit Court; *William C. Utz*, Special Judge.

Action by Burdette C. Lutz, administrator of the estate of Lydia A. Stierheim, deceased, against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

George H. D. Gibson and H. Willard Phipps, for appellant.

Frank L. Littleton, Stannard & Howard, C. E. Cowgill and L. J. Hackney, for appellee.

HOTTEL, C. J.—Appellant brought this action against appellee to recover damages for the death of his decedent, who was struck and killed by one of appellant's trains at a public street crossing in the town of Charlestown. The issues of fact were presented by a complaint in two paragraphs and an answer in general denial. There was a trial by jury which resulted in a general verdict in favor of appellant for \$2,300. With this verdict the jury returned answers to interrogatories, and, on appellee's motion

1. the court rendered judgment on such answers in favor of appellee. The ruling on this motion is the only error assigned and relied on for reversal presented by appellant. Whether such ruling constitutes reversible error depends on whether there is irreconcilable conflict between such answers and the general verdict, and in determining this question we are confined to a consideration of the facts pleaded, the answers to interrogatories and the general verdict.

We therefore first indicate the facts pleaded affecting the questions presented by the appeal. For this purpose, the substance of the averments of the second paragraph of complaint will be sufficient. Such paragraph alleges that at the time decedent was run over and killed, appellee, by virtue of a contract, lease and traffic arrangement, was operating its trains over the tracks and right of way of the Baltimore, Ohio and Southwestern Railroad Company; that the tracks pass through the town of Charlestown and cross nearly at right angles Water Street in the town, which runs in an eastwardly and westwardly direction; that the street is much travelled and used by the public at all times; that at the point where the railroad crosses the street there is a

Lutz v. Cleveland, etc., R. Co.—59 Ind. App. 16.

narrow cut, fifteen feet deep, which cut extends along the right of way for more than a half mile from the north side of the street; that the railroad tracks are laid on the bottom of the cut; that the street crossing is graded down to a level with the railroad track and crosses the track at grade; that for a distance of 100 feet on either side of the track there is a cut in the street to bring it down to the level of the crossing; that the cut has abrupt walls on both sides thereof; that at a distance of about 200 yards both north and south of the street crossing, the railroad makes an abrupt and sharp curve to the west; that on the north side of the street and west of the railroad track there was a large dwelling house, trees and fencing; that dwelling houses were located on both sides of the track and north of the crossing for a distance of half a mile, with lights in them at nighttime; that all of said conditions herein stated existed at the time of the injury; that on the day of the injury, appellant's decedent was going along Water Street and attempted to cross the railroad; that on account of the cut in the street and railroad right of way, the curve in the track, the buildings, trees, and fencing aforesaid, the decedent, as she approached the crossing, was unable to see the approaching train; that she was on foot and traveling on the south side of the street, and when she approached near the track she stopped, looked and listened and used all due care to ascertain if a train was then coming along the track toward the crossing and nearly approaching the same, and not seeing or hearing any train approaching the crossing at the time, went upon the railroad track at such crossing and while thereon, was immediately run down and killed by a train operated by appellee approaching from the north; that appellee negligently failed to give the statutory signals when approaching such crossing, and carelessly and negligently ran its train at a high rate of speed, to wit, sixty miles an hour; that on account of the high rate of speed and on account of appellee's failure to give warning of the approach of its

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train to the crossing, decedent did not see or hear the train until it was too late for her to extricate herself and get off the track and avoid being struck and killed by such train, all without any fault on her part.

It is first contended by appellee in support of the judgment rendered by the trial court that the answers to interrogatories show that appellant's decedent was guilty of contributory negligence. The answers affecting such question show in substance that appellant's decedent was a widow, sixty-six years of age, blind in the left eye; that at the time in question, and for ten years previous thereto, she lived on the south side of Water Street, west of the railroad and about ninety feet from the crossing; that at the time in question she was going to her daughter's who lived on the opposite side of the railroad and about 300 feet from the home of the decedent; that when she started to go from her home across to the home of her daughter she had a wolen scarf tied over her head and under her chin; that the injury happened at the intersection of the railroad tracks and Water Street on December 15, 1908, at about 6:30 p. m.; that the headlight on the locomotive was burning at the time it approached and passed over Water Street crossing; that appellee's train when it passed over the crossing in question was running from forty to fifty miles per hour; that the engineer sounded a station signal when about 3,000 feet north of Water Street, a loud blast that could be and was heard at Water Street crossing; that no crossing signal was sounded or bell rung as the train approached the crossing; that the train No. 33 received orders at Blotcher to take the passing track at Charlestown in order to allow the Baltimore and Ohio Southwestern north bound train No. 20 to pass; that appellee's train took such siding and was passed by such north bound train; that decedent before she was struck, crossed the track on the south side of Water Street and went to a point on the east side of the track near the east rail and immediately thereafter proceeded to walk

along the east side of the track northwardly on a line about parallel with the track and within four feet thereof to the point where she was struck by the train; that there was no evidence as to the distance she walked northwardly parallel with such track; that from a point three feet east of the east rail of said track to a point twelve feet west of the west rail of such track and parallel therewith there was an unobstructed view of the headlight of a train approaching from the north for a distance of 800 feet from Water Street; that the train which struck decedent was a regular passenger train which had passed over the Water Street crossing daily for some time immediately before the accident and decedent was familiar with Water Street crossing and with the operation of trains across the crossing; that there was an electric light burning one square north of Water Street crossing and within fifteen feet of the track at the time decedent was killed; that, at the time decedent was struck by said train, there were lights shining from windows of houses both on the east and west of the track and near the railroad track for a distance of two squares north of the street; that the engineer operating the train on the night in question, if he had been looking south and watching the track ahead of him, with his engine under control and running the same at the rate of eighteen to twenty miles an hour, could have stopped the train.

In this narration of the substance of the answers to interrogatories, we have given to those throwing light on the question of the contributory negligence of decedent a construction as favorable to appellee as the answers will permit and more favorable than appellant is willing to concede. Indeed, it is contended by appellant that certain of the questions and answers are conflicting and inconsistent and therefore antagonize each other and should be disregarded. The interrogatories which appellant thus criticises are as follows: "2. Where was the said Lydia Stierheim, and where was she going at the time she received her said in-

juries? A. On railroad track at intersection of Water Street going to Mrs. Morrow's. * * * 33. Before Lydia Stierheim was struck by the train, did she cross defendant's track on the south side of Water Street and go to a point on the east side of the track? A. Yes to a point near the east rail. * * * 34. If you answer interrogatory 33 in the affirmative, state whether immediately thereafter said Lydia Stierheim proceeded to walk northwardly on a line about parallel with the track to the point where she was struck by the train. A. Yes. * * * 35. If you answer interrogatories 33 and 34 in the affirmative, state whether while she was so walking northwardly on the street the said Lydia Stierheim was east of the railroad track and within four feet thereof. A. Yes. * * * 36. If you answer interrogatories from 33 to 35, inclusive, in the affirmative, state whether after she crossed the track from west to east and while she was so walking northwardly on the street, said Lydia Stierheim traveled from 20 to 25 feet before she was struck by the train. A. No evidence. * * * 37. If you answer interrogatory in the negative, then state how far Lydia Stierheim walked northwardly after she had crossed the railroad track before she was struck by the train. A. No evidence as to distance. * * *."

Appellant claims, in effect, that interrogatory No. 2 shows that decedent was struck while on appellee's track, while interrogatories Nos. 33, 34 and 35, show that she had crossed over the track and was struck at a point on the street east of the track; that No. 34 shows that decedent, after crossing the track, proceeded to walk northwardly about parallel with the track to the point where she was struck, while Nos. 36 and 37 show that there was no evidence that decedent had walked, or was walking, northwardly on the street, or parallel with the track, at such time, and hence that there is such conflict in these answers, that, for the purposes of the question under consideration, they must be disregarded. It is true, that answers to interrogatories

Lutz v. Cleveland, etc., R. Co.—59 Ind. App. 16.

which are themselves in conflict nullify each other

2. and hence have no controlling influence against the general verdict. *Cleveland, etc., R. Co. v. Federle* (1912), 50 Ind. App. 147, 152, 98 N. E. 123, and cases cited.

It is also true, we think, that the answers above indicated are not entirely free from ambiguity and uncertainty. However, giving to them and to the other interrogatories, the meaning and interpretation which we have indicated above, do they, in fact, show that decedent was necessarily guilty of contributory negligence? The burden of such issue was on appellee, and before such interrogatories can be permitted to overturn the general verdict, which was a finding for appellant on this issue, the court must be able to say that such interrogatories affirmatively show a state of facts which necessitates the conclusion that decedent was guilty of negligence contributing to her injury and death, regardless of any and all evidence that might have been introduced under the issues tending to support the general verdict on such issue, or tending to explain such answers and reconcile them with such verdict. *Jeffersonville Mfg. Co. v. Holden* (1913), 180 Ind. 301, 307, 102 N. E. 21; *Peru Heating Co. v. Lenhart* (1911), 48 Ind. App. 319, 331, 332, 95 N. E. 680; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 301, 302, 53 N. E. 235.

The conduct of the injured party in such cases must be determined from all the facts and circumstances surrounding him, or her, at the time he or she was required

4. to act, and the ultimate question to be determined is, whether he or she so circumstanced and situated exercised the kind and degree of care that would be used by an ordinarily prudent person when so circumstanced and so situated.

In the instant case the complaint alleged, and the general verdict found, that decedent before attempting to

5. cross appellee's tracks stopped, listened and looked both ways for approaching trains, and neither saw

nor heard any train. Nothing appears in the answers to interrogatories to dispute this finding of the general verdict. It follows that decedent can not be said to have been negligent in attempting to cross appellee's tracks. Appellee, in effect, concedes this to be true, but insists that such answers affirmatively show that decedent after crossing such tracks was walking along the side thereof facing the approaching train and hence could have seen such train and was guilty of negligence contributory to her death. The answer to this contention is, that such answers do not show how long decedent faced in the direction of the approaching train, nor what caused her to face in that direction, nor the distance she walked parallel with the track, nor do such answers show where decedent was when she first saw the approaching train. They do show that there was another train passing over the main line near this crossing for which the train that struck decedent took the siding. For aught that appears from such answers, there may have been some obstruction immediately in front of decedent that caused her to turn parallel with the track and such other train, or some signal given, or noise made, by it may have attracted her attention at the very instant she was crossing, or immediately after she crossed the track and just as the other train was about to come into view, and that, when she turned and saw the approaching train, it was too late to reach a place of safety.

The answers show that if appellant's decedent had looked at the most favorable place for looking, viz., when within a space three feet east of the east rail of the track and twelve feet west of the west rail thereof, she could have seen the locomotive for a distance of 800 feet at most. The train was then approaching her at the rate of forty to fifty miles an hour, and if she had seen it when it first came into view she would have had but twelve to fourteen seconds to get out of its way. Taking into consideration decedent's age, the time and place where she was injured, and all the

facts and circumstances surrounding her at the time, we think that under the averments of the complaint, evidence might have been introduced that would have completely exonerated her from any inference of contributory negligence arising from the answers here made by the jury to the interrogatories propounded to it, and completely reconciled such answers with the general verdict. *Cleveland, etc., R. Co. v. Miles* (1904), 162 Ind. 646, 70 N. E. 985; *Cleveland, etc., R. Co. v. Lynn* (1909), 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017; *Pittsburgh, etc., R. Co. v. Burton* (1894), 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; *Chicago, etc., R. Co. v. Turner* (1904), 33 Ind. App. 264, 69 N. E. 484; *Pennsylvania Co. v. Coyer* (1904), 163 Ind. 631, 72 N. E. 875; *Rice v. City of Evansville* (1886), 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22; *Shuck v. State, ex rel.* (1893), 136 Ind. 63, 35 N. E. 993.

It is further contended by appellee that the answers to interrogatories show that the beneficiaries under the law have suffered no pecuniary loss. In support of this

6. contention appellee relies on interrogatories Nos. 31 and 32 and answers thereto. They are as follows: (31) "Considering the said Lydia Stierheim's age at the time of her death, the increased care and attention she would have required as she advanced in years, and her increasing disability for work, what was the actual, pecuniary loss to her said children, or to any or either of them, by her said death? A. No evidence." (32) "Considering the said Lydia Stierheim's age at the time of her death, and the increased care and attention she would likely have required as she advanced in years, and her increasing disability for work, and considering the reasonable value and cost of her support, maintenance and care, if the decedent's said children any or either of them, sustained any pecuniary loss by the death of the said decedent, state fully and particularly the items of such loss and value thereof? A. No evidence." Appellee insists that the answer of "No evidence" to these

interrogatories was in legal effect a finding that no pecuniary loss was sustained.

As a general rule an answer of "No evidence" to an interrogatory submitted to a jury is a finding against the party having the burden as to the proposition stated in such interrogatory. *William Laurie Co. v. McCullough* (1910), 174 Ind. 477, 481, 90 N. E. 1014, 92 N. E. 337, Ann. Cas. 1913 A 49, and cases cited. Assuming, without deciding, that such interrogatories were proper, it will be observed that by them the jury was not asked the direct question as to whether decedent's children had suffered any pecuniary loss by her death, but such interrogatories enumerated other facts, or elements, which may have been proper to consider in determining the question of pecuniary loss, but of which there may have been no evidence. It follows that such answers do not necessarily mean that there was no evidence that decedent's children suffered no pecuniary loss on account of her death. The general verdict found that they did suffer such loss, and the answers to interrogatories are not necessarily in conflict therewith. It follows from what we have said that the trial court erred in sustaining appellee's motion for judgment on the answers to interrogatories and that on account of such error the judgment below must be reversed; but, while such answers might have been reconciled with the general verdict by evidence admissible under the issues, they are of such a character as to indicate that the ends of justice will be better served by this court ordering the court below to sustain the motion for new trial rather than by ordering a judgment on the general verdict. The judgment below is therefore reversed with instructions to the trial court to grant appellant's motion for new trial and for any other proceedings not inconsistent with this opinion.

NOTE.—Reported in 108 N. E. 886. As to duty of traveler on highway to use his senses of seeing, hearing, etc., to avoid dangers at crossings, see 90 Am. Dec. 780. As to measure of damages recov-

Rader v. A. J. Barrett Co.—59 Ind. App. 27.

erable by wife or child for death of husband or parent by wrongful act, see 3 Ann. Cas. 103; 16 Ann. Cas. 931. See, also, under (1) 38 Cyc. 1927; (2) 38 Cyc. 1926; (3) 38 Cyc. 1927; 38 Cyc. 1915 Ann. 1902-new; 33 Cyc. 1070; (4) 33 Cyc. 981; (5) 33 Cyc. 1142; (6) 38 Cyc. 1924.

RADER ET AL. v. A. J. BARRETT COMPANY ET AL.

[No. 8,610. Filed May 13, 1915.]

1. **MECHANICS' LIENS.**—*Foreclosure.*—*Pleading.*—*Ownership of Property.*—A pleading seeking the foreclosure of a mechanic's lien must aver facts showing the ownership of the property against which the lien is sought to be enforced. p. 30.
2. **MECHANICS' LIENS.**—*Foreclosure.*—*Cross-Complaint.*—*Sufficiency.*—*Ownership of Property.*—A cross-complaint seeking the enforcement of a mechanic's lien which, though not directly averring that cross-defendant was the owner of the property, alleged facts sufficient to disclose that he was the holder of the legal title at the time the material was furnished and the labor performed, sufficiently showed ownership to withstand a demurrer. p. 30.
3. **APPEAL.**—*Review.*—*Demurrer to Answer.*—Where a special paragraph of answer to a cross-complaint seeking the enforcement of a mechanic's lien amounted merely to a denial of the authority of cross-complainants to furnish the material and perform the labor sued for, the court did not err in sustaining a demurrer thereto. p. 30.
4. **MECHANICS' LIENS.**—*Foreclosure.*—*Evidence.*—*Sufficiency.*—Evidence showing that at the time the materials were furnished and the labor performed in the repair of a hotel building, the real estate was in charge of certain persons under a contract of purchase requiring them to make repairs within a certain time, for which the owner should not be liable, and providing that the sum expended should be forfeited if the contract of purchase was not consummated by the execution of a deed, that thereafter such contract was not performed and possession of the real estate was surrendered to the owner, and showing that the material was furnished to and the labor performed for the occupants under such contract on the recommendation of the owner, did not show a case within the rule that a purchaser in possession under a contract of purchase can not cloud the vendor's title by suffering mechanics' liens to be filed against the property, nor within the rule that the conduct of the owner amounted to no more than mere inactive consent to the furnishing of the material and the performing of the labor, and was sufficient to support a finding against the owner. pp. 31, 32.

Rader v. A. J. Barrett Co.—59 Ind. App. 27.

5. **MECHANICS' LIENS.** — *Statutes.* — *Construction.* — The provision for mechanics' liens is purely a statutory remedy, and while one seeking its application must bring himself within the provisions of the statute in order to be successful, the statute is to be liberally construed to the end that those coming within its provisions may have the protection that it was intended to give. p. 32.

From Fulton Circuit Court; *Harry Bernetha*, Judge.

Action commenced by Frank D. Rader, in which A. J. Barrett Company and others filed cross-complaints, and from the judgment rendered on such cross-complaints Frank D. Rader and another appeal. *Affirmed.*

Arthur Metzler, for appellants.

Holman, Stephenson & Bryant and *O. F. Montgomery*, for appellees.

MORAN, J.—Appellant, Frank D. Rader, brought an action to quiet the title to a small tract of real estate located upon the shore of Lake Manitou, in Fulton County, Indiana, upon which was located a hotel and dwelling house. The title was quieted as against all parties to the action, except appellees, who filed cross-complaints for the foreclosure of mechanics' liens for material furnished and labor performed in the repair of the hotel building. A decree of foreclosure was rendered in favor of appellees, from which appellants, Frank D. Rader and his wife, Hattie M. Rader, have appealed. In addition to appellants, Frank D. Rader and Hattie M. Rader, Carey L. and Ina T. Smith were made parties to appellees' cross-complaints. The cross-complaints of appellees, A. J. Barrett Co., and Stilla P. Bailey, are for material furnished, that of appellee, Charles Alspach, is for labor performed in the repair of the hotel building. Notices of the intention to hold mechanics' liens upon the real estate described in the complaint and in the cross-complaints, respectively, were filed in the recorder's office of Fulton County, Indiana, within the time required by law, copies of which notices are made a part of the cross-complaints.

Among other things, it is alleged, in substance, in the cross-complaints, that the indebtedness sought to be recovered was for building material furnished to be used, and was used, in making additions to the hotel and dwelling, and that the labor was performed thereon; and at the time the material was furnished and labor performed, appellant, Frank D. Rader, was the owner of the real estate; but had entered into a contract to sell the same to Carey L. Smith. Upon the overruling of demurrers by appellants, Frank D. and Hattie M. Rader, to the cross-complaints, they answered each cross-complaint in two paragraphs of answer, the first being a general denial; the second is based upon a written contract, which alleges in substance that on May 25, 1909, appellants entered into a written contract with Carey L. and Ina T. Smith for the sale of the real estate in question, and in consideration, appellants were to receive in exchange certain real estate in the city of Indianapolis; Carey L. and Ina T. Smith were to discharge certain liens against the Indianapolis real estate, and to carry out certain other obligations set forth in the contract, and upon failure to comply with certain conditions in the contract within six months from the date of entering into the same, Carey L. and Ina T. Smith were to forfeit their rights under the contract; they failed to carry out the contract and in July, 1909, surrendered the possession of the hotel property. At no time did Carey L. and Ina T. Smith have any interest in the hotel property; appellants did not contract with cross-complainants for the material furnished and labor performed, nor did they authorize the furnishing of the same, and if the material was furnished and the labor performed, it was at the instance and request of Carey L. and Ina T. Smith. A demurrer by appellees to the second paragraph of answer was sustained.

The errors relied upon for reversal are, (1) the court erred in overruling the demurrer of appellants to the cross-complaints of appellees; (2) the court erred in sus-

taining demurrers of appellees, A. J. Barrett Co., Stilla P. Bailey and Charles Alspach, to the second paragraph of answer of appellants to the amended cross-complaints of appellees; (3) the court erred in overruling appellants' motion for a new trial.

The infirmity urged against the cross-complaints is that they do not show the ownership of the property against which the liens were sought to be enforced, and that

1. it is essential that the pleadings disclose by proper averments the ownership. This contention is supported by authority. *Adams v. Buhler* (1888), 116 Ind. 100, 18 N. E. 269; *Little v. Friend* (1906), 167 Ind. 36, 78 N. E. 238. In the cross-complaint of appellee,

2. A. J. Barrett Co. there is an averment, that Frank D. Rader was the owner of the legal title of the real estate upon which the lien was attempted to be foreclosed. The cross-complaints on the part of the other appellees plead the facts as to the execution of the contract between appellants and Carey L. Smith and wife, in reference to the sale of the real estate in question. While there is no direct averment that appellant, Frank D. Rader, was the owner of the real estate, there are sufficient facts pleaded in connection with the execution of the contract between appellants and Carey L. Smith and wife to disclose that Frank D. Rader was the holder of the legal title to the real estate at the time the material was furnished and the labor performed, and at the time of the filing of the cross-complaints. Under the rule announced in *Domestic Block Coal Co. v. DeArney* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, each of the cross-complaints was sufficient to withstand a demurrer.

Appellants' second paragraph of answer to appellees' cross-complaints was merely a denial of the authority of appellees to furnish the material and perform the

3. labor as sued for in the cross-complaints. Appellees were bound to prove this fact in order to recover.

Rader v. A. J. Barrett Co.—59 Ind. App. 27.

And further, all the evidence that could have been admitted under this paragraph of answer was admissible under the answer of general denial. The court did not err in sustaining appellees' demurrer to this paragraph of answer. *Ripley v. Lemcke* (1909), 43 Ind. App. 336, 87 N. E. 237; *Craig v. Frazier* (1891), 127 Ind. 286, 26 N. E. 842.

The sufficiency of the evidence to sustain the decision of the court as presented by the motion for a new trial is, in our judgment, the most serious question raised. Two

4. of appellees furnished material for the hotel building and one of appellees performed labor in repairing the same. During the time of the furnishing of the material and performing of the labor, Carey L. Smith and wife held a contract of purchase for the real estate in question. Among the many conditions provided in the contract, Smith and his wife were to expend within sixty days from the date of entering into the contract, the sum of \$500 in the way of improving the hotel property, and appellants were not to be liable for the same; and if the contract was not finally consummated by a deed of conveyance being executed to them, they were to forfeit the sum so expended. The conditions of the contract were not carried out on the part of Smith and his wife in reference to certain property in the city of Indianapolis, which they had agreed to convey to appellants, in exchange for appellants' property. Smith and wife were to convey the Indianapolis property to appellants, free of liens and by merchantable title, failing to do so they surrendered up the possession of the hotel property within the time fixed for the completion and the carrying out of the various provisions of the contract of sale and purchase.

Appellants earnestly contend that they did not authorize the furnishing of the material used and the labor performed upon the hotel building, that they were the owners of the property at the time and a foreclosure of the liens in favor

of appellees as against the property is unwarranted under the facts when the law is correctly applied to the same.

The remedy invoked by appellees to enforce the collection of their claims is statutory and is in derogation of the common law, and he, who relies upon the statute,

5. must, in order to be successful, bring himself within its provisions. However, when one brings himself clearly within the provisions of the statute, the statute is liberally construed to the end that those who do come within its provisions may have the protection that it was intended to give to material men and mechanics. *Potter Mfg. Co. v. A. B. Meyer & Co.* (1909), 171 Ind. 513, 86 N. E. 837, 131 Am. St. 267; *Clark v. Huey* (1895), 12 Ind. App. 224, 40 N. E. 152; *Davis & Rankin, etc., Mfg. Co. v. Vice* (1896), 15 Ind. App. 117, 43 N. E. 889; *Cincinnati, etc., R. Co. v. Shera* (1905), 36 Ind. App. 315, 75 N. E. 293; *Krotz v. A. R. Beck Lumber Co.* (1905), 34 Ind. App. 577, 73 N. E. 273; *Toner v. Whybrew* (1912), 50 Ind. App. 387, 98 N. E. 450. Section 8296 Burns 1914, Acts 1909 p. 295, provides: "The entire land upon which any such building, erection or other improvement is situated, including that portion not covered therewith, shall be subject to lien to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or material furnished; and where the owner has only a leasehold interest, or the land is encumbered by mortgage, the lien, so far as concerns the buildings erected by said lien-holder, is not impaired by forfeiture of the lease for rent or foreclosure of mortgage; but the same may be sold to satisfy the lien and [be] removed within ninety [days] after the sale by the purchaser." Was the labor per-

4. formed and the material furnished in the case at bar for the immediate use and benefit of appellants? It is conceded that they knew the building was being repaired and the labor being performed and the material furnished, and there is no question but that the building was enhanced

Rader v. A. J. Barrett Co.—59 Ind. App. 27.

in value to the extent of the value of the materials furnished and labor performed. In order, however, to fasten a mechanic's lien upon appellants' property, it required more than mere inactive consent on their part to the furnishing of the material and performing of the labor. *Neeley v. Searight* (1888), 113 Ind. 316, 15 N. E. 598; *Toner v. Whybrew, supra*. Was there more than the mere inactive consent on the part of appellants to the furnishing of material and performing of the labor? When they entered into the contract with Smith and his wife to sell the property in question, one of the conditions was that they were to expend \$500 in improving the property, and if they failed to carry out certain conditions on their part in reference to the clearing of title to certain Indianapolis property, to be taken by appellants in exchange for the hotel property, they were to forfeit the money so expended.

Appellee, Charles Alspach, testified that he had heard that he couldn't get any money for his work and intended to throw up the job, when he met appellant, Frank D. Rader, who told him to go ahead and finish it, that he would get his money. Appellee, Stilla P. Bailey, testified that he heard that Mr. Rader had made a deal with Carey L. Smith, and he saw appellant, Frank D. Rader, and asked him if he had sold out, and asked him if Mr. Smith was going to do anything there, and appellant said to him, "I think he is, you had better get after him". Afterwards appellant said to him if he was letting anything go out there on his account not to let it go, and that he didn't let anything go after that. Abner J. Barrett, a member of the A. J. Barrett Co., appellee, testified that he furnished the material through appellant, Frank D. Rader, and Carey L. Smith; that appellant brought Smith to him and introduced him, and told him to sell him the material; he said it was all right to let Smith have the material. It was appellant's statement that induced him to let Smith have the material, and he would

not have furnished it to Smith without seeing appellant first.

At the time appellants entered into the contract of sale with Smith and his wife, they realized that the hotel building needed repairing, and evidently to better their security during the interim until Smith and his wife would be in shape to convey to them the Indianapolis property, they exacted of them the repairing of the hotel building. While the material was being furnished and the labor performed, they knew it was doubtful as to whether the conveyance would be finally consummated. A purchaser in possession of real estate under a contract of purchase cannot cloud the vendor's title by suffering mechanics' liens to be filed against the real estate covered by the contract of purchase. *Rusche v. Pitman* (1904), 34 Ind. App. 159, 72 N. E. 473; *Peoples Sav., etc., Assn. v. Spear* (1888), 115 Ind. 297, 17 N. E. 570.

The facts in this case, however, do not bring it within this rule, nor do they bring it within the rule that the conduct of appellants amounted to no more than mere inactive consent to the furnishing of the material and the performing of the labor. An examination of the entire record discloses that the trial court was warranted in finding that there was sufficient evidence to sustain the material allegations of each of appellees' cross-complaints.

A correct result was reached in this cause, and it is therefore affirmed.

NOTE.—Reported in 108 N. E. 883. As to liens of materialmen, see 79 Am. Dec. 268. As to the power of a vendee or lessee to subject the owner's interest to mechanics' liens, see 23 L. R. A. (N. S.) 601. See, also, under (1, 2) 27 Cyc. 374; (3) 31 Cyc. 303; (4) 27 Cyc. 416, 59; (5) 27 Cyc. 20, 17.

VERMILLION v. FIRST NATIONAL BANK OF GREEN-CASTLE.

[No. 8,181. Filed May 26, 1914. Rehearing denied April 2, 1915.
Transfer denied May 13, 1915.]

1. **APPEAL.—Review.—Findings.—Conclusiveness.**—Findings of fact based on conflicting oral testimony are conclusive on appeal where there is evidence to support them. p. 43.
2. **CHATTEL MORTGAGES.—Rights of Creditors.—Validity.**—Chattel mortgages executed for no other purpose than to secure and procure the payment of the valid claims of the mortgagee are not void by reason of the fact that their existence operates to delay and hinder other creditors, but to render them void for such reason it must appear that the hindering and delaying resulted from a fraudulent intent of the parties to the instrument. p. 43.
3. **CHATTEL MORTGAGES.—Stock in Trade.—Reservation of Right to Sell.**—Chattel mortgages covering a mercantile stock are not invalid by reason of provisions giving the mortgagor the right to retain possession of the mortgaged goods and to sell in the usual course of trade, requiring him to account to the mortgagee for such sales, and, after deducting the cost of making the sales, to apply the proceeds on the debts secured, and also authorizing the investment of a sufficient amount of the proceeds in new goods to keep the stock in salable condition. p. 44.
4. **CHATTEL MORTGAGES.—Fraud Against Creditors.—Fraudulent Intent.**—Under §7479 Burns 1914, §4920 R. S. 1881, relating to conveyances or assignments of goods made with intent to hinder, delay or defraud creditors, fraudulent intent is a question of fact, and, while such intent may be inferred from facts and circumstances proven, the court or jury trying the issue must draw the inference, and find the existence of the ultimate fact, in order that it may be said that fraudulent intent has been established; hence where the facts were specially found, and there was no finding of the ultimate fact of fraudulent intent, the chattel mortgages involved can not be held void as in fraud of creditors. p. 45.
5. **CHATTEL MORTGAGES.—Validity.—Secret Trusts.**—Under §7480 Burns 1914, §4921 R. S. 1881, providing that transfers or assignments of goods made in trust for the use of the person making the same shall be void as against creditors, the existence of a trust must be found as a fact, and, when so found, the law draws the inference of fraud, but chattel mortgages covering a stock of merchandise, valid on their face and containing nothing to warrant the inference of a secret trust, can not be held void

under such section, where the court's finding of facts included neither a finding of the existence of such a trust, nor facts from which it might be inferred. p. 45.

6. **CHATTEL MORTGAGES.—*Remedies of Creditors.—Disposition of Proceeds.***—Where mortgages covering a stock of merchandise contained provisions for the application of proceeds from the sale of goods in regular course of trade to the replenishing of the stock and, after deducting the cost and expense of making the sales, to the payment of the notes, the proceeds not used in replenishing the stock, less the cost and expense of making the sales, will be regarded, as against creditors, as having been applied to the payment of the notes, regardless of whether they were actually so applied; and in determining the amount that should be regarded as applied on the notes, where the mortgagor personally transacted the business of the store, the value of his services are to be included as a part of the cost and expense of making the sales, but any portion of the proceeds used by him for living expenses over and above the value of his services must be deemed as having been applied on the mortgage debt. pp. 47, 50.

7. **CHATTEL MORTGAGES.—*Remedies of Creditors.—Disposition of Proceeds.***—Where, in determining the amount that should, as against creditors, be deemed to have been applied on the mortgage debt out of the proceeds arising from the sale of merchandise in regular course of trade, the court found that the mortgagor's wife performed services in the selling of the merchandise, nothing could be deducted therefor, from the amount that must be deemed to have been applied on the debt, in the absence of any finding as to what her services were worth. p. 50.

8. **CHATTEL MORTGAGES.—*Remedies of Creditors.—Disposition of Proceeds.***—Where chattel mortgages covering a stock of merchandise provided that the mortgagor should apply the proceeds from the sale of goods less the cost and expense of carrying on the business, to the payment of the mortgage debt, and the court found that in the period intervening between the execution of the two mortgages the mortgagor purchased fixtures, but failed to find that they were reasonably necessary, and the terms of the latter mortgage were broad enough to include such fixtures as a part of the mortgaged property, and such fixtures, subject to the mortgage lien have passed into the hands of a trustee for other creditors, substantial justice requires that they be treated as a part of the general fund to be equitably distributed. p. 52.

9. **APPEAL.—*Petition for Rehearing.—Questions Reviewable.***—Where on the original presentation of an appeal from the judgment in a suit to foreclose mercantile chattel mortgages, no contention was made that the mortgages did not cover all addi-

Vermillion v. First Nat. Bank—59 Ind. App. 35.

tions the mortgagor made to the stock, the court will not, on petition for rehearing, pass upon the proposition that the lien of such mortgages only attached to such additions to the stock as were paid for out of proceeds from sales made. p. 54.

From Putnam Circuit Court; *John M. Rawley*, Judge.

Action by the First National Bank of Greencastle against James E. Vermillion and another. From the judgment rendered, the defendants appeal. *Reversed*.

Miller, Shirley, Miller & Thompson, for appellants.

Thomas T. Moore, for appellee.

CALDWELL, J.—The complaint is in two paragraphs. By the first appellee seeks to recover on a promissory note in the principal sum of \$2,420.23, executed by appellant, Vermillion, January 3, 1908, and to foreclose a chattel mortgage on a stock of goods and store fixtures securing the note. By the second paragraph appellee declares on two promissory notes in the respective sums of \$800 and \$400 executed by said appellant April 13, 1908, and March 28, 1910, respectively, and seeks to foreclose a chattel mortgage executed by said appellant on the property, on August 4, 1910, to secure the notes.

Appellant Heine was made a defendant by reason of a certain trust created in him in behalf of Vermillion's general creditors under a certain instrument dated August 22, 1910, and hereinafter described. By each paragraph of complaint appellee sought also injunctive relief against said Heine to restrain him from disposing of the property alleged to be in his possession. Each appellant filed a general denial to the complaint. Heine filed also a special answer of four paragraphs. By the second and fourth, facts are alleged to the effect that by the chattel mortgages and the understanding and agreement between appellee and Vermillion, a secret trust was created in favor of the latter, thereby rendering the mortgages void as against the general creditors. By the third and fifth paragraphs, facts are alleged to the effect

that certain funds received by said Vermillion from the sales of portions of the goods should, as against such creditors, equitably be deemed applied on the notes, and that by such application they should be held to be paid. Trial by the court and finding and judgment in favor of appellee for the full amount of the notes, and decreeing the foreclosure of the mortgages as prayed for.

By request of the parties, the court made a special finding of facts and stated conclusions of law thereon. The material facts found are in substance as follows: That about January 1, 1908, appellant, Vermillion, in the settlement of the estate of his deceased father, Isaiah Vermillion, became the owner of a merchandising business, stock of goods, and store fixtures in Greencastle, Indiana; that for many years Isaiah Vermillion had conducted the business at said place, and that from January 1, 1908, to August 22, 1910, appellant, Vermillion, conducted the business as such owner; that in the settlement of the estate appellant, Vermillion, assumed the payment of certain debts thereof, including a promissory note held by appellee in the sum of \$2,420.23; that on January 3, 1908, said appellant executed to appellee in payment of the note a promissory note in the sum of \$2,420.23 bearing eight per cent interest, running six months, and calling for reasonable attorney's fees, and to secure the payment of the note executed also a chattel mortgage on the stock of goods and fixtures, being the note and mortgage declared on in the first paragraph of complaint; that on April 13, 1908, said appellant executed to appellee a promissory note for \$800 bearing eight per cent interest, running ninety days and providing for reasonable attorney's fees, to secure a loan in the sum then made, and that on March 28, 1910, he borrowed an additional sum of \$400, and executed to appellee a note therefor in said sum, running ten days, interest and attorney's fees as aforesaid; that said two loans were procured by said appellant on his representation that the respective sums were necessary in

order that he might be enabled to meet competition by increasing his stock of goods; that on August 4, 1910, said appellant executed to appellee a second chattel mortgage on the stock and fixtures to secure the two notes last described, which notes and mortgage are declared on in the second paragraph of complaint; that each of said chattel mortgages was duly recorded within ten days after its execution; that the first chattel mortgage describes the property mortgaged as follows:

“Said mortgagor’s general stock of merchandise, dry goods, cloaks, wraps, suits, notions, fixtures and personal property, and goods, wares and merchandise of every kind and character belonging to or used in any way in connection with the said mortgagor’s general dry goods store, situated,” etc.;

that the second mortgage repeats the property description and in addition specifically mentions the furniture, show cases, safe, counters and cash register. Each of the mortgages contains the following provisions:

“It is agreed that this mortgage shall hold and cover all new goods purchased and placed in said stock, to take the place of any goods sold out of said stock under the terms of this mortgage. * * * It is agreed and understood by the parties hereto that said James E. Vermillion shall retain the possession of, and have the use of said property until said note hereby secured becomes due, and if said note is not promptly paid at maturity said First National Bank shall then have the right to take and keep possession of said property wherever it may be found, without any process of law, and the same shall become the absolute property of said First National Bank, and the said James E. Vermillion hereby expressly agrees not to sell or remove said property from the place where it now is without the consent in writing of said First National Bank, nor shall he assign or lease the same without such consent, but it is agreed, however, that said mortgagor may sell such goods in the usual course of trade or business upon the express condition that he shall account to said bank for said sales and that after deducting from the gross amount thereof the costs and expenses of making such

sales, the residue thereof shall be applied to the debt hereby secured. If in the course of the business of selling such stock to provide funds to pay said debt hereby secured, it shall be necessary in order to keep up the stock and sell other goods that new goods shall be bought to fill up the stock and supply broken lines, said mortgagor with the consent of said bank may invest such of the proceeds as may be agreed upon in new goods to fill up the broken lines, and in such case, it is agreed that new goods shall be paid for and shall take the place of the goods so sold, and the said goods so purchased shall pass under the lien of this mortgage, and be subject to sale to satisfy the same in like manner as the goods so sold."

There is a further provision to the effect that if said property shall come into the hands of any assignee or trustee, etc., to be sold, the mortgagee may take possession of it, and sell at public or private sale on notice.

The court further finds that appellant, Vermillion, paid no part of the sum due on the notes except the interest; that after the execution of the first mortgage, he continued to carry on the business with the knowledge and consent of the mortgagee, selling the mortgaged goods in regular course, buying new goods with a part of the proceeds, and adding them to the stock, and that he so continued up to August 22, 1910; that during that time, said appellant had no means of support for himself and family other than what he derived from the mortgaged goods and the proceeds of the sale thereof; that within that time he used of the goods and of the proceeds thereof, for the maintenance of himself and family the following amounts: in 1908, \$1,766.43; in 1909, \$1,250.31; in 1910, up to August 22, \$864.59, total \$3,881.33; that after the execution of the second mortgage, on August 4, 1910, up to August 22, 1910, Vermillion received in cash from the sale of goods \$979.24; that he paid for expenses within the time \$211.78; that he used in the support of himself and family \$63.70; that within the entire period, he expended of the proceeds in the purchase of new fixtures which he placed in the store, and used in connection

with such business \$280; that during the time from January 3, 1908, to August 22, 1910, said appellant, with the knowledge and consent of appellee, sold goods on credit, and that on the latter date, there was due him from divers persons for mortgaged goods sold on credit accounts aggregating \$2,400; that the net proceeds of the sales of the goods, except the amounts used by appellant Vermillion, for support as aforesaid, and except also the sum of \$280 invested in fixtures, were with the knowledge and consent of appellee reinvested in goods which were added to the stock to take the place of goods sold; that appellee had no knowledge that any part of the net proceeds was used for any purpose other than to buy new goods; that the mortgages cover \$759.09 worth of fixtures that have not been sold or changed since the execution of the first mortgage; that there was no agreement or understanding between appellee and Vermillion that any part of the proceeds of the sale of the goods should be used or applied by Vermillion in the support of himself or family, and that such use of such proceeds was without the knowledge or consent of appellee; that during the entire time from January 3, 1908, to August 22, 1910, appellant, Vermillion, worked in the store as a salesman, and that his services were worth \$100 per month; that during the greater part of said time Vermillion's wife also worked in the store as clerk, and that neither received anything for their services, except the amounts heretofore set out in this finding; that at various times between January 3, 1908, and August 22, 1910, appellee demanded payment of the notes, but that at each of such times Vermillion replied to appellee that he was reinvesting the net proceeds of sales in new goods to replenish the stock, and that unless he did so he could not meet competition, and that the stock was steadily increasing in value; that appellee believed the representations and by reason thereof required said appellant to pay only the interest on the notes; that on August 22, 1910, appellant, Vermillion, being indebted to various persons in the

aggregate amount of about \$7,000 for goods bought and added to said stock, executed to his coappellant, Heine, a writing by which he transferred to Heine the entire stock and all the fixtures, and all accounts due him growing out of the business; that Heine thereupon took possession of the business and of the property under the writing, and from that time until the time of the trial operated the store. The writing provides in substance that, by it, Vermillion transfers all the property to Heine in trust for appellee and twenty-eight other persons, firms and corporations who were creditors of Vermillion, or for so many of them as should accept the terms of the trust; the writing authorized Heine to operate the store and to sell goods in regular course, and to buy such goods as might be needed, and that the net proceeds after paying expenses of the business and of the trust, should be applied *pro rata* on the claims of the beneficiaries of the trust. It gives to the trustee discretionary powers to sell all the property as a whole at public or private sale, the proceeds to be applied as aforesaid, and the surplus, if any, to be paid to Vermillion.

The court further finds that the accounts aggregating \$2,400 went into the possession of the trustee, and that in February, 1911, he held the following: Unsold goods of the value of \$13,000; cash on deposit \$2,800; accounts aggregating \$1,700 to \$1,800; fixtures of the value of \$759.09. The court found due on said notes sued on \$3,899.39, and that reasonable fees for appellee's attorney was \$152, total \$4,051.39. The conclusions of law are in effect as follows: (1) that the mortgages and notes sued on are valid, and that the mortgages are a lien on the property therein described, and that appellee is entitled to a foreclosure of the mortgages; (2) that appellee is entitled to recover on the notes and mortgages the sum of \$4,051.39, and to have the mortgaged property sold to pay this sum. The court entered judgment on the findings and conclusions of law against appellant, Vermillion, for the sum of \$4,051.39, and

costs, and decreed the foreclosure of the mortgages against both appellants, and a sale of the mortgaged property, and the application of the proceeds, including the cash on hand, to the payment of the judgment and costs, the overplus, if any, to remain subject to the further order of the court.

Appellants separately challenge the sufficiency of the evidence to sustain the decision, and challenge also the correctness of each conclusion of law. It appears from the

1. record that there is substantial evidence sustaining the finding in every material respect. It is true that there is considerable conflict in the oral testimony, but under such circumstances, the finding being supported as indicated, we can not weigh the evidence. *Jones v. Luddington* (1913), 180 Ind. 33, 101 N. E. 483; *Seybold v. Rehwald* (1912), 177 Ind. 301, 95 N. E. 235; *First Nat. Bank v. New* (1896), 146 Ind. 411, 45 N. E. 597. We, therefore, proceed to determine the correctness of the conclusions of law.

Here two questions become important. (1) Does the finding show that the mortgages were made and accepted with the intent to hinder, delay or defraud Vermillion's creditors? If so, they must be held to be "void as to the persons sought to be defrauded". §7479 Burns 1914, §4920 R. S. 1881. (2) Does such finding show the creation and existence of a secret trust for the use of appellant, Vermillion? If so, said mortgages are void as against Vermillion's creditors, existing or subsequent. §7480 Burns 1914, §4921 R. S. 1881.

The provisions of the mortgages together with the extraneous facts are covered by the finding. If from a consideration of the provisions of the mortgages, and the terms

2. of any attending or subsequent agreement or understanding, as shown by the finding, it can not be said that the parties were actuated by any other purpose than to secure, and procure the payment of appellee's claims, and if it does not appear that the conduct of the parties was out of harmony with such purpose, then such mortgages must be held valid, even though their existence may have

hindered or delayed other creditors in the collection of their claims. The hindering and delaying of the creditors here will not avoid the mortgage. To have such effect, such hindering and delaying must have resulted from a fraudulent intent of the parties to the instrument. But if it should be determined from the finding that the mortgages were executed and accepted, and held merely as a shield to ward off other creditors from Vermillion's property, while he retained it in his own possession with power to sell it for his own use and benefit, and apply the proceeds as he might choose, then the mortgages must be held to be fraudulent and void. There being no question respecting the validity of the debts represented by the notes, then if the mortgages were given and accepted and held pursuant to an honest purpose to secure the notes, and not otherwise, they are not void. *Meyer, etc., Co. v. Shenkberg Co.* (1899), 11 S. Dak. 620, 89 N. W. 126; *Red River, etc., Bank v. Barnes* (1899), 8 N. Dak. 432, 79 N. W. 880.

The mortgages provide that the mortgagor may retain possession of the mortgaged property and sell the mortgaged goods in the usual course of trade or business, and

3. that he shall account to the mortgagee for such sales, and that after deducting from the gross proceeds thereof, the cost and expenses of making such sales, the residue shall be applied on the debts secured. It is provided also that a sufficient amount of such proceeds may be invested in new goods in order that the stock may be kept in salable condition, and that the lien of such mortgages shall extend to the goods so purchased. The mortgages are not invalidated by such provisions. *Fisher v. Syfers* (1887), 109 Ind. 514, 10 N. E. 306; *Burford v. First Nat. Bank* (1903), 30 Ind. App. 384, 66 N. E. 78; *Hamrick v. Hoover* (1908), 41 Ind. App. 411, 84 N. E. 28. But the provisions of the mortgages should be considered in connection with anything disclosed by the finding respecting extraneous agreements or understandings between the parties

to said instruments. It is provided by statute, as we

4. have indicated, that a conveyance or assignment of goods, etc., made or suffered with the intent to hinder, delay or defraud creditors, or other persons, of their lawful damages shall be void as to the persons sought to be defrauded. §7479 Burns 1914, *supra*. Under this statute, fraudulent intent is a question of fact. §7483 Burns 1914, §4924 R. S. 1881. While such fraudulent intent may be inferred from facts and circumstances proven, yet the court or jury trying the issue must draw the inference, and find the existence of the ultimate fact in order that it may be said that fraudulent intent, as such ultimate fact, is established. Where, as here, there is a special finding of the facts, it is not sufficient to state therein the evidence or indicia of fraud, or the facts from which fraud may be inferred, but the ultimate fact of fraudulent intent must be stated in the finding in order that relief may be granted under an appeal to said statute. The finding does not contain such ultimate fact. The mortgages cannot, therefore, be held void under said section. Even were the court in its capacity as the tryer of the issue of law permitted to draw such inference from facts found, such facts found would not justify such inference in this case. *Stout v. Price* (1900), 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857; *Fulp v. Beaver* (1894), 136 Ind. 319, 36 N. E. 250; *First Nat. Bank v. Dovetail Body, etc., Co.* (1896), 143 Ind. 550, 41 N. E. 370, 52 Am. St. 435; *Morgan v. Worden* (1892), 145 Ind. 600, 32 N. E. 783; *Fletcher v. Martin* (1890), 126 Ind. 55, 25 N. E. 886. But, as we have also indicated, it is

5. provided by statute that transfers or assignments of goods, etc., made in trust for the use of the person making the same shall be void as against creditors existing or subsequent of such person. §7480 Burns 1914, *supra*. Under this statute it is held that the existence of a trust must be found as a fact, and that being so found, the law draws the inference of fraud. The finding of the existence

of the trust leads with certainty to the conclusion that the transfer or assignment is void by the terms of the statute. *Hamrick v. Hoover, supra; Stout v. Price, supra*. The mortgages here are valid on their face. The creation or existence of a secret trust for the use of the mortgagor can not be deduced from their terms. The court did not find the existence of such a trust. Conceding, however, that the existence of such a trust might be inferred from facts found which compel such an inference, then if it should appear that notwithstanding the provisions of the mortgages, there existed a secret agreement, or an implied understanding, or that such an agreement was subsequently made, or that such an understanding arose, that the mortgagor was to be permitted to use the proceeds of the sale of the goods, or any substantial part thereof, for his own use and benefit, and as he might choose, and that he was not to be required to account for such proceeds, or apply them on the debts described in the mortgages, such facts would require an inference of the existence of such a trust. *New v. Sailors* (1888), 114 Ind. 407, 16 N. E. 609, 5 Am. St. 632; *Stout v. Price, supra; Hamrick v. Hoover, supra; Mayer v. Feig* (1888), 114 Ind. 577, 17 N. E. 159. The court here finds neither the existence of such a trust, nor the facts from which it must be inferred. On this subject, the court finds in substance that the debts secured were *bona fide*; that appellee frequently insisted on payment; that there was no understanding or agreement that Vermillion should use any of the proceeds for purposes of his own, and that such use on his part of such proceeds was without the knowledge or consent of appellee, and that appellee had no knowledge that any part of the net proceeds of the sale of said goods was not reinvested in new goods to take the place of those sold. The finding then in the place of sustaining the theory of a secret trust, when considered with the provisions of the mortgages, rebuts the existence of any such trust. The court did not err in its conclusion of law that said mort-

gages are valid. *New v. Sailors, supra*; *Mayer v. Feig, supra*; *Stout v. Price, supra*.

The mortgages being valid, we shall proceed to determine whether any part of the proceeds of the sale of goods should be treated as applied as a credit on the debts

6. secured by the mortgages as against appellant, Heine, and the creditors represented by him. It is not contended that such part of said proceeds as was reinvested in goods bought and added to the stock should be so applied. Moreover, it seems to be conceded that if said mortgages are valid, such goods when added to the stock became subject to the lien of the mortgages, under the circumstances presented here. For the purposes of this decision, we shall treat such conceded matter as correct. Appellants contend, however, that if the mortgages are held to be valid, all sums expended by Vermillion in support of himself and family should, as against Heine, as such trustee, be so applied. Like contention is made respecting the sum invested in fixtures. "Until the contrary appears, it will be presumed that a mortgagor who is permitted to retain possession of and sell mortgaged chattels does so under an agreement to account as the agent of the mortgagee, and the proceeds will be regarded as applied to the liquidation of the mortgage debt, whether they have been actually paid over or not." *New v. Sailors, supra*, 412.

In a case where a mortgage of a stock of goods contains substantially the same provisions as to possession, sale and application of the proceeds as the mortgages here, it was said: "When such an agreement has been entered into, and the mortgagor fails, either in whole or in part, to apply the proceeds accordingly, the law will make the application, when necessary for the protection of the interest of other creditors." *Mayer v. Feig, supra*. See, also, *Burford v. First Nat. Bank, supra*. It will be observed that were not such a presumption indulged to the effect that there was an agreement for the application of the proceeds of sale on

the mortgage debt as aforesaid, in the absence of any showing on the subject of such an agreement, or if effect were not given to such an agreement, if made, any such chattel mortgage containing such a power of sale would of necessity be held to create a trust for the use of the mortgagor, and consequently be void, as against creditors injuriously affected thereby. When, as here, the mortgage includes such an agreement among its provisions, it is only by giving effect to such agreement, by the application of the proceeds, as per the terms thereof, that courts are warranted in holding such a mortgage valid, as against such creditors. On this theory, we proceed to determine the rights of the parties.

So far as is material here, the finding is in substance as follows: The amount of the notes including attorney's fees is \$4,051.39. Appellant Vermillion used of the goods and proceeds of the sale thereof, in the support of himself and family \$3,881.33, and in the purchase of fixtures which were placed and remained in the store \$280. The balance of the net proceeds, after deducting ordinary operating expenses, was used in purchasing new goods, which were added to the stock. Each of the mortgages contains the provision that after deducting from the gross amount of such proceeds, "the cost and expenses of making such sales, the residue thereof shall be applied on the debt hereby secured". That appellant Vermillion from January 3, 1908, to August 22, 1910, worked in the store as a salesman and gave all his time to the business, and that his services were reasonably worth \$100 per month; that his wife worked in the store during the greater part of the time; that neither of them received anything for their services except the amounts heretofore set out in this finding, referring presumably to said sum taken out for support. There is no finding of the value of the wife's services or of the value of the joint services, as compared with the amount so taken out for support.

It is apparent that the amounts so used by appellant

Vermillion for support must as against appellant Heine be applied as a credit on the notes. The question of whether there shall first be deducted from said sum so used an amount representing the value of Vermillion's services is more difficult. By calculation the value of the services for the time named is \$3,163.33. If such deduction is made, it can be only on the theory that the value of said appellant's services is legitimately a part of the cost and expense of making the sales. Said appellant by the terms of the mortgage did not bind himself to participate actively or personally in the selling of the goods. There might be a case where the mortgagor would be physically or otherwise unable to do so. Some such a situation might have arisen here. In either of such cases, should such a mortgagor procure some other person to perform the services which otherwise he would have performed personally, we assume that the reasonable salary of such other person would be a part of the legitimate expenses of the sale. It may be said that in making such sales, the mortgagor was acting for himself, and in his own interest. In a sense this is true, but the theory by which a mortgage with such an agreement is upheld is that the entire arrangement is for the benefit of the mortgagee. It is his debt that is secured and that is to be paid, and without such arrangement, the entire scheme is void. In the equitable solution of a situation such as is presented here, the courts either assume that the mortgagor in making such sales is acting as agent for the mortgagee or treat him as such agent. The mortgagor is merely one of the instrumentalities used by the mortgagee in collecting his debt by the sale of the goods. He is one of such instrumentalities just as the use of a storeroom, advertising, etc., are instrumentalities. When the time for adjusting the rights of all the parties has arrived, the value of the services of the mortgagor, as such agent, has become a part of the matter to be adjusted, and has entered into the value

of the property to be distributed. The arrangement being valid is presumed to be beneficial to all persons interested in such distribution. The value of such services has contributed to and enhanced such benefits along with whatever else has entered into the conduct of the business. In this case the value of Vermillion's services contributed to the creating of the status as it existed when the rights of other creditors attached through appellant Heine. We are of the opinion that the value of such services should be deducted as indicated. The fact that said appellant had no other means of support confirms us in our conclusion. Such being the case, he could not have carried out such an arrangement, unless the business he was conducting in some manner afforded him means of support. The law looks with favor upon such an arrangement as was made here, if fairly made with the purpose of honestly carrying it out. It would be unreasonable to say that such favor is limited to mortgagors who are affluent. If the law denies the right of a mortgagor under circumstances presented here to receive the reasonable value of his services, it would render impossible of performance an arrangement which it fully countenances. We conclude that the value of Vermillion's services, as found by the court to be \$3,163.33, should be deducted from the sum of \$3,881.33, used for support, and that only the residue thereof, \$718 should be applied as a credit on the mortgage debt as against appellant Heine. Nothing

7. can be allowed for the wife's services, as the court fixed no value on them. Under circumstances very similar to those presented here, the value of such
6. services were allowed in *Bliss & Wood v. Couch* (1891), 46 Kan. 400, 26 Pac. 706, the court saying: "The mortgagor, if he may keep the possession, may as well make the sales as a stranger. He acts in that respect as a *quasi* agent, at least, of the mortgagee, and as such agent and salesman is entitled to compensation for his services." Such case is cited with approval in *Gleason v. Wilson*

(1892), 48 Kan. 500, 29 Pac. 698, but is weakened somewhat by reason of the facts in *Frankhouser v. Ellett* (1879), 22 Kan. 127, 147, 31 Am. Rep. 171, upon which it is based. See, also, *Noyes v. Ross* (1899), 23 Mont. 425, 59 Pac. 367, 75 Am. St. 543, 47 L. R. A. 400.

There is a line of cases, of which *Noyes v. Ross*, *supra*, is in one respect a sample, by which under circumstances presented here, chattel mortgages providing that the reasonable living expenses of the mortgagor may be deducted before applying the proceeds of the sales on the debts secured, are held to be valid. We do not approve the doctrine of such cases, however. If a sum allowed a mortgagor is measured by the value of services rendered by him, it can not be said that the arrangement is for his benefit, since he gives full return for all that he receives. His living expenses, however, would not bear any ascertained relation to the value of the services rendered, and hence in such a case, it might well be said that an arrangement with such an element is for his benefit, and that a mortgage containing a provision to that effect is void, in that it creates a trust for his use.

Our attention is called to the question decided in *Stout v. Price*, *supra*. In that case, there was apparently an extraneous agreement, by which the mortgagor was to be permitted to retain from the stock of goods and the proceeds of the sale thereof an amount sufficient to support himself and family, not exceeding, however, ten dollars per week, which amount so retained was not to be applied on the mortgage debt, and was not so applied. The mortgage was held void as against creditors, on the ground that it created a trust for the use of the mortgagor. That case is not out of harmony with our conclusion. The amount to be retained there was based on living expenses, and regardless of the value of any services rendered. Our attention is also called to *Dice v. Irvin* (1887), 110 Ind. 561, 11 N. E. 488. There Dice executed to his wife a chattel mortgage on certain

stock, including twenty-two fat hogs. Subsequently the wife permitted the husband to slaughter the hogs and dispose of them in the support of their common family. The question was as to whether such subsequent fact rendered the mortgage void. The holding is that the mortgage was not thereby invalidated. The question of whether the wife would have been charged with the value of the hogs as against creditors whose rights intervened was not presented or decided.

We have yet to consider whether the sum of \$280 expended for new fixtures should be applied as a credit on said mortgage debts. The finding is that said mort-

8. gator invested that amount of the proceeds of the sales in fixtures which were placed in the store and used in carrying on the business. By the specific facts found respecting the receipts and expenditures during the period after the execution of the second mortgage, to wit, after August 4, 1910, it sufficiently appears that such fixtures were in the store at the time of the execution of the second mortgage, which is broad enough in its terms to comprehend such fixtures within its lien. By the terms of the trust instrument under which appellant Heine claims, these fixtures were transferred to him. There is no finding on the subject of whether such fixtures were reasonably necessary in the proper operation of such store. If reasonably necessary, their cost might be claimed as expense and allowable under the terms of the mortgage. If not reasonably necessary, it would seem that by their purchase, appellant Vermillion exceeded his authority under the mortgage, and that the amount should be applied as a credit on the mortgage debt. In any event, should we direct the sum so invested in fixtures to be applied on the mortgage debt, in the interest of appellant Heine, we should be compelled to enforce the lien of appellee's second mortgage against the fixtures. This course would result in the payment to appellee of the net proceeds derived from the sale of the fixtures on foreclosure.

These fixtures, subject to appellee's lien have passed into the hands of Heine by virtue of the trust instrument, and in our judgment, substantial justice may be accomplished by treating them as a part of the general fund to be equitably distributed.

From our conclusions, it is apparent that there must be a reversal, but in our judgment, the rights of the parties may be worked out without a new trial. There is in the hands of appellant Heine a fund composed of the following: The residue of the goods and fixtures, accounts including the uncollected portion of the accounts resulting from the business before the execution of the trust instrument, and thereby transferred to him, aggregating \$2,400 cash and accounts accumulated by him under the trust instrument. The cause is reversed at the cost of appellee, and the court is directed to restate its conclusions of law to the following effect, and decree accordingly: that the mortgages and notes are valid, and that the mortgages are a lien on the stock of goods and fixtures, and that appellee is entitled to a foreclosure of the mortgage; that appellee is entitled to recover as against appellant Vermillion the sum of \$4,051.39; that as against appellant Heine there should be applied on the sum due on the notes a credit in the sum of \$718, leaving the balance thereof as against appellant Heine \$3,333.39; that appellee is entitled to a foreclosure of the mortgage and a sale of the mortgaged property; that a fund should be created from the proceeds of the sale, cash on hands and accounts collected, and from this sum there should be paid to appellee the sum of \$3,333.39, with interest from the rendition of the judgment appealed from, next to the payment of the claims of creditors represented by appellant Heine, next to the payment of the sum of \$718 due appellee, with interest as aforesaid, the overplus, if any, to be paid into court, subject to the court's further order.

Judgment reversed.

ON PETITION FOR REHEARING.

CALDWELL, P. J.—The petition for a rehearing contains a specification in substance that the court erred in its original opinion in failing to give any weight to the

9. provision of the mortgage, to the effect that new goods purchased and added to the stock to fill up broken lines should be paid for out of the proceeds of sales, and that goods so purchased and paid for should pass under the lien of the mortgages. It is now argued that as determined from such provision only goods so purchased and paid for became subject to the mortgage lien, and that goods purchased and not paid for should be held to be available in the creation of a fund for the payment of the claims of the general creditors. Respecting such specification and argument, it may be said that in the original presentation of this case in this court appellants made no such contention. Neither in the original nor in the reply brief was any point directed to the proposition that only new goods that had been paid for passed under the lien of the mortgage. As stated in the original opinion, the case was apparently presented for our consideration on the theory that the mortgage, if valid, covered additions to the stock. Under such circumstances, as has many times been determined by both the Supreme Court and this court, we are not required to consider such proposition presented to us, as it is, for the first time on a petition for rehearing.

In other respects we have carefully reconsidered the case, and while we recognize that it presents a number of questions not free from difficulty, we find no occasion to depart from our disposition of it as contained in the original opinion. The petition for rehearing is overruled.

NOTE.—Reported in 105 N. E. 530; 108 N. E. 370. As to the validity of a chattel mortgage of stock of merchandise as affected by a provision or agreement giving the mortgagor the possession with power of sale, see 18 L. R. A. 604; 36 L. R. A. (N. S.) 1181. See, also, under (1) 3 Cyc. 360; (2) 6 Cyc. 1097; (3, 6, 7, 8) 6 Cyc. 1107; (4) 6 Cyc. 1099; (5) 20 Cyc. 805, 557; 6 Cyc. 1107; (9) 3 Cyc. 214.

SMITH ET AL. v. GRAVES.

[No. 8,394. Filed January 19, 1915. Rehearing denied April 16, 1915. Transfer denied May 13, 1915.]

1. **APPEAL.—Jurisdiction.—Briefs.—Record.**—Where the facts disclosed by the briefs and record on appeal disclose a question as to the court's jurisdiction of the appeal, that question must be determined before the merits can be considered, although not presented by a motion to dismiss. p. 58.
2. **JUDGMENT.—Final Judgment.—Appeal.**—A final judgment from which an appeal will lie is one that disposes of all the issues, as to all the parties, to the full extent of the power of the court to dispose of the same. p. 58.
3. **APPEAL.—Parties.**—Where the jury finds against certain defendants and in favor of others, the latter are neither necessary nor proper parties to an appeal from the judgment on such verdict. p. 58.
4. **MALICIOUS PROSECUTION.—Joint Tortfeasors.—Liability.**—The liability of a number of persons in procuring a malicious prosecution is several, without any right of contribution that can be enforced as between them, though they may be sued jointly or separately, and a satisfaction of the claim for damages obtained from one or any number of such persons terminates all liability against the others. p. 59.
5. **MALICIOUS PROSECUTION.—Joint Tortfeasors.—Liability.—Judgment.—Appeal.**—Where a person injured by a malicious prosecution procured by three persons elects to bring his action against the parties jointly, he can obtain no other legal satisfaction for the alleged wrong than that afforded by the judgment he obtains in such action, even though such judgment is based on a verdict against only two of the defendants without a finding for or against the third, and, since in view of the nature of their liability none of the defendants affected by the verdict can complain that it was not also against their co-defendant, the rule in actions on contract, that a verdict against part of the defendants without a finding either for or against the others is a nullity, does not apply; hence the judgment rendered in such case, like judgments in other cases, is presumptively valid, and is a final judgment from which an appeal will lie. pp. 60, 62.
6. **TRIAL.—Findings.—Verdict.—Ventre de Novo.**—The rule, where the facts are specially found, that all issues and material facts not found will be adjudged against the party who had the burden of proving them, so as to defeat a motion for *venire de novo* on the ground of a failure to find some material fact, or a

failure to find for or against some of the defendants, has no application in cases where the facts are not specially found, so that in the latter instance a verdict that is not a finding on all the issues to be tried is defective, and subject to a motion for a *venire de novo*. p. 60.

7. **APPEAL.—Review.—Parties.—Dismissal.**—In an action against three defendants for malicious prosecution, where the verdict and judgment were against two of the defendants without a finding either for or against the third, an appeal taken by each of the three must be dismissed as to the third, since there was no judgment from which he could appeal. p. 62.
8. **MALICIOUS PROSECUTION.—Complaint.—Sufficiency.**—If a complaint for malicious prosecution shows the institution of the prosecution by the filing of the affidavit or complaint maliciously and without probable cause, it need not allege that defendants maliciously and without probable cause procured a warrant to be issued for plaintiff's arrest and that they followed up and continued such prosecution. p. 64.
9. **MALICIOUS PROSECUTION.—Complaint.—Sufficiency.**—A complaint for malicious prosecution alleging facts to show that plaintiff had been prosecuted by defendants, that in so doing they acted maliciously and without probable cause, that the prosecution was terminated by plaintiff's acquittal and final discharge, and that he had been damaged by such prosecution, states a cause of action. p. 65.
10. **MALICIOUS PROSECUTION.—Joint Tortfeasors.—Trial.—Evidence of Other Prosecutions by One Defendant.**—In an action against three defendants for malicious prosecution, evidence that one of the defendants had instituted other prosecutions against the plaintiff was admissible against such defendant as tending to show malice and want of probable cause on his part, and his codefendants were not harmed by the admission of such evidence in view of an instruction to the jury limiting its application to the one defendant. p. 65.
11. **MALICIOUS PROSECUTION.—Damages.—Evidence.—Fee Paid in Defending Prosecution.**—In an action for malicious prosecution evidence of the amount of attorney's fees plaintiff was required to pay in defending against the prosecution is competent as affecting the amount of damages, and its admissibility is not affected by the question of whether the amount was reasonable or otherwise, though evidence upon that question is also competent. p. 66.
12. **APPEAL.—Review.—Refusal of Instructions.**—Where the instructions given covered all questions at issue under every phase of the evidence, there was no error in refusing other instructions. p. 66.

13. **APPEAL.—Review.—Instructions.**—Where each of three paragraphs of complaint in an action for malicious prosecution stated a cause of action against all the defendants, an instruction that if the evidence established all the material allegations of either of such paragraphs the finding should be against all the defendants, was not erroneous, especially since the instructions given are to be considered together, and the court by other instructions advised the jury that it might find against such defendant, or defendants, only as the evidence warranted. p. 66.
14. **APPEAL.—Review.—Evidence.—Verdict.—Excessive Damages.**—Although the evidence in an action for malicious prosecution was sharply conflicting on many issuable facts, the verdict for plaintiff can not be disturbed, either on the evidence or on the ground that the damage awarded was too large, where there was evidence to sustain the verdict, and the amount awarded was not such as to warrant the court in holding that it was excessive. p. 67.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Warren W. Graves against Mortimer Smith and others. From a judgment for plaintiff, the defendants appeal. *Appeal dismissed* as to appellant Ned Kocher, and *judgment affirmed* as against the others.

Frank D. Butler and *Lawrence & Rhodes*, for appellants.
Reasoner & Ward, for appellee.

FELT, J.—This is a suit by appellee, Warren W. Graves, against appellants Mortimer Smith, Levi Bowser, and Ned Kocher, to recover damages for alleged malicious prosecution of appellee on a charge of bribing a voter at the election in 1908. The complaint was in six paragraphs on which issues were joined against all the defendants by general denial. The case was tried by a jury and resulted in a verdict as follows: "We the jury, find for the plaintiff, Warren W. Graves, against the defendants Mortimer Smith, Levi Bowser, and we assess plaintiff's damages at one thousand dollars." Appellants Smith and Bowser filed a joint and several motion for a new trial. All the appellants thereafter filed motion for a *venire de novo*, which was overruled by the court and excepted to by the defendants. There-

upon the court overruled the motion for a new trial to which the "defendants each separately and severally excepted". Appellants Smith and Bowser separately and severally moved to arrest the judgment, which motion was overruled and "the defendants each separately and severally excepted".

Thereupon the court rendered judgment as follows: "It is now therefore ordered, adjudged, and decreed by the court that the plaintiff have and recover of and from the defendants Mortimer Smith and Levi Bowser the sum of \$1,000 as damages herein, to which adjudgment of the court said defendants separately and severally excepted." The record shows that each of the defendants prayed and was granted an appeal. The appeal bond recites that Smith and Bowser have taken an appeal from the judgment of \$1,000 rendered against them in favor of appellee. Error has been separately assigned in this court by each of the three appellants.

No motion has been filed to dismiss the appeal, but the foregoing facts are shown both by the briefs and by the record. The question of the court's jurisdiction of

1. the appeal must therefore be determined before the merits of the appeal can be considered.

The record suggests the question, Is there a final judgment from which an appeal lies? The jury did not find either for or against Mr. Kocher, and no judgment

2. was rendered either for or against him. A final judgment is one that disposes of all the issues, as to all the parties involved in the controversy presented by the pleadings, to the full extent of the power of the court to dispose of the same. *Wehmeier v. Mercantile Banking Co.* (1912), 49 Ind. App. 454, 456, 97 N. E. 558; *Barnes v. Wagener* (1907), 169 Ind. 511, 514, 82 N. E. 1037; *Crow v. Evans* (1912), 178 Ind. 661, 662, 100 N. E. 8.

3. When several persons are defendants and the jury finds for part and against part of such defendants, on

appeal by the defendants against whom judgment was rendered, the defendants who obtained a verdict and judgment in their favor are neither necessary nor proper parties to the appeal. *Town of Windfall City v. First Nat. Bank* (1909), 172 Ind. 679, 686, 87 N. E. 984, 89 N. E. 311; *Southern R. Co. v. Elliott* (1908), 170 Ind. 273, 276, 82 N. E. 1051; *Hubbard v. Burnett-Lewis Lumber Co.* (1912), 51 Ind. App. 97, 99, 98 N. E. 1011. But the foregoing proposition is only relatively important here for the reason that there is no judgment either for or against Mr. Kocher.

The action is in *tort* and appellee can have but one satisfaction for the damages, if any, sustained by him. The

liability of the appellants as *tortfeasors* is several and

4. the suit may be maintained against all, or one, or any number of them. There is no right of contribution that can be enforced as between such defendants or persons liable for the same *tort*. A satisfaction of such claim for damages obtained from one or any number of such defendants or persons so liable for the same *tort* ends all liability therefor as against any and all persons against whom liability might have been enforced before such satisfaction was obtained. *American Express Co. v. Patterson* (1881), 73 Ind. 430, 436; *Baltes v. Bass, etc., Mach. Works* (1891), 129 Ind. 185, 188, 28 N. E. 319; *City of Valparaiso v. Moffitt* (1895), 12 Ind. App. 250, 253, 39 N. E. 909, 54 Am. St. 522. As a general rule, a joint tortfeasor against whom judgment has been rendered cannot complain that judgment was not also obtained against a coparty to the suit. 2 R. C. L. 234; *Burroughs v. Eastman* (1894), 101 Mich. 419, 59 N. W. 817, 45 Am. St. 419, 24 L. R. A. 859. While a person injured by joint tortfeasors may maintain separate suits against each person who aided in the commission of the tort, yet if he elects to sue them jointly and obtains a judgment in such action, he can not afterwards maintain separate suits against such persons, but is compelled to abide the result of such suit. In 2 Black, Judg-

ments (2d ed.) §780, it is stated: "The plaintiff who is injured by a tortious act shared in by several must elect whether he will prosecute them all in a joint action, or sue one or more separately. He can not do both." In *Sessions v. Johnson* (1877), 95 U. S. 347, 348, 24 L. Ed. 596, the court says: "Where a trespass is committed by several persons, the party injured may sue any or all of the wrongdoers, but he can have but one satisfaction for the same injury, any more than in an action of assumpsit for a breach of contract. Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he can not afterwards sue any one of them separately; or, if he sues any one of them separately, and has judgment, he can not afterwards seek his remedy in a joint action because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy."

In this case the appellee having elected to institute a joint action and having secured judgment, he must obtain his satisfaction for the alleged wrong by a judgment in

5. such suit, or not at all by process of law. As supporting the foregoing propositions by analogy, we cite: *Baltes v. Bass, etc., Mach. Works, supra. Maple v. Cincinnati, etc., R. Co.* (1883), 40 Ohio St. 313, 48 Am. Rep. 685; 15 Cyc. 259. In determining whether the judgment in this case is a final judgment from which an appeal lies, we have given consideration to questions and decisions bearing only indirectly on the jurisdiction of the court to decide this appeal upon its merits. In some decisions the

6. rule that all issues and material facts not found in a special verdict or a special finding will be adjudged against the party who had the burden of proving them was applied in cases where there was a general verdict, to defeat a motion for a *venire de novo* presented upon the ground

that there was a failure to find upon some of the issues of the case, or a failure to find for or against some of the defendants. *Alexandria Mining, etc., Co. v. Painter* (1891), 1 Ind. App. 587, 590, 28 N. E. 113; *Board, etc. v. Pearson* (1889), 120 Ind. 426, 430, 22 N. E. 134, 16 Am. St. 325. But in the more recent case of *Maxwell v. Wright* (1903), 160 Ind. 515, 67 N. E. 267, the subject is considered at length, the authorities reviewed and the conclusion reached that the rule has no application to cases where there is a general verdict, or a general finding. To the same effect is, *Douglas v. Indianapolis, etc., Traction Co.* (1906), 37 Ind. App. 332, 335, 76 N. E. 892. In *Maxwell v. Wright, supra*, the court states that the reason for the rule that a failure to obtain a finding is equivalent to a finding against the party having the burden of proving the issue or fact, is that a special finding is required to state all the facts that are proven by the evidence. In the same case, in discussing a general verdict, the court said: "Hence, when the jury fails to find for the plaintiff or defendant on an issue between the parties, it is apparent from the verdict that the jury has stopped short of a full determination of the case, and the verdict is therefore ill and defective, and subject to a *venire de novo*." The converse of this rule must be true, that if the verdict and judgment show a full determination of the issues to be tried, and settle all the rights and liabilities of the parties to the suit, the verdict is not ill, and such judgment is a final judgment. In *Maxwell v. Wright, supra*, the suit was upon a note against three defendants and the execution of the note was in issue. A verdict against one of the defendants without a finding either for or against the others was held insufficient, and the Supreme Court ordered the motion for a *venire de novo* sustained. It also held that the plaintiff was entitled to have the question of the execution of the note determined as to all parties who had put it in issue, and that the trial was incomplete without it; that the verdict was not re-

Smith v. Graves—59 Ind. App. 55.

sponsive to the whole case presented by the issues and was a nullity; that judgment could not be entered on a verdict which finds only on a part of the issues. The foregoing conclusions were right and clearly applicable to suits on contract. But the underlying principle, or reason of the rule announced is, that a part of the issue presented has not been determined, and the plaintiff has a right to a determination of all the questions presented by the issues.

In the case at bar, the plaintiff has had a full determination of the issues and is seeking to uphold the judgment.

No right is left unsettled. He can have but one satis-

5. faction of his claim for damages for the alleged wrong and can now enforce it in no other suit. The obligations of contracts and the right of contribution do not enter into the question where the suit is for damages against several persons for the same tort. The appellants can not complain that judgment was not also rendered against their codefendant, Kocher. The fact that there is a right of appeal and the possibility of a reversal does not change the situation since the presumption is in favor of the validity of the judgment rendered. The character of the judgment rendered can not be changed by presuming that it is invalid, that it will be reversed, that the case will be tried again and that complications may then arise as to the parties to the suit. For the purposes of this question, the judgment must be

treated as the satisfaction of appellee's claim for dam-

7. ages. The attempt to make Kocher an appellant and to assign separate error in his behalf can not change the situation. There is no pretense of a judgment

5. against him, from which he can appeal. The attempted appeal as to him is dismissed. We hold that there was no issue left untried, that the verdict against appellants, Smith and Bowser, was a complete determination of the whole case, and that the judgment rendered thereon is a final judgment from which an appeal lies.

The defendants to each paragraph of the complaint sep-

arately and severally demurred thereto for insufficiency of the facts alleged to state a cause of action and the overruling of each of said demurrers is assigned as error. The first three paragraphs are against appellant, Mortimer Smith, only, and the fourth, fifth, and sixth are against all of the appellants. Omitting introductory and formal averments about which no question is raised, the first paragraph in substance charges that on February 11, 1910, appellant, Smith, maliciously and without probable cause filed and caused to be filed in the Miami Circuit Court an affidavit wherein he maliciously and without probable cause, charged appellee with the crime of bribery of an elector of Pipe Creek Township of the county on November 3, 1908, when appellee was a candidate for trustee of the township; that on February 11, 1910, a bench warrant was issued on the affidavit and directed to the sheriff of the county, in pursuance of which appellee was arrested on the charge and taken before the judge of the Miami Circuit Court; that he gave bond for his appearance and in May, 1910, was publicly tried on the charge by a jury and found not guilty; that thereupon judgment was duly entered acquitting him of the offense and the prosecution was thereby terminated in his favor; that prior to the filing of the charge against him he had always borne a good reputation for honesty, integrity, and for being a lawabiding citizen in the community where he resided; that accounts of his arrest on the charge were published in four or five newspapers of general circulation in the county and the same was extensively talked about by his neighbors and acquaintances; that his arrest caused him great mental worry, anguish, suffering and distress of mind, subjected him to public ridicule, humiliation and disgrace, and damaged his good name and reputation, and diminished his happiness; that he was compelled to and did employ attorneys, for whose services he will be compelled to pay \$350. The second paragraph is substantially the same as the first, except that copies of the publications are

set out in the paragraph. The third paragraph is the same as the first except it contains additional averments to the effect that the criminal prosecution was instituted against him by Smith, maliciously and vindictively for the purpose of harassing, vexing and distressing appellee and with the intent and purpose of wrongfully and unlawfully intimidating him and compelling him to give up his office of trustee of Pipe Creek Township and of causing him to expend money in his defense; that the prosecution was wrongfully, maliciously, and without probable cause, instituted, conducted, and carried on by Smith to final termination, for the purposes aforesaid. The fourth, fifth, and sixth paragraphs in their order, are similar to the first, second, and third, except the charges are made against Smith, Bowser, and Kocher in each of the last three paragraphs, and in the sixth it is alleged that they conspired and acted together in the malicious prosecution of appellee.

The objections urged against the several paragraphs of complaint are that it is not sufficiently shown by the averments that the defendants to each of the paragraphs

8. caused appellee to be prosecuted maliciously and without probable cause; that maliciously, and without probable cause to file, or cause to be filed, against a person an affidavit, charging him with a crime is insufficient; that to make a good complaint it is necessary to allege that the defendant or defendants, maliciously and without probable cause therefor procured a warrant to be issued for his arrest on such charge, and to show that the defendants followed up and continued such prosecution. The appellants' contentions are not tenable. If the complaint shows the institution of the prosecution by the filing of the affidavit, or complaint, maliciously and without probable cause, it is unnecessary to repeat such allegations with reference to the issuance of process or a warrant, or as to any of the subsequent steps in the alleged prosecution. The complaint in each paragraph thereof shows that appellee had been pros-

ecuted by the defendant or defendants named in such
 9. paragraph; that in so doing they acted maliciously
 and without probable cause; that the prosecution
 had terminated by appellee's acquittal and final discharge;
 that he had been damaged by such prosecution. Each par-
 agraph states a cause of action against the defendants
 named therein. *Ruston v. Biddle* (1873) 43 Ind. 515; *Coffey*
v. Myers (1882), 84 Ind. 105, 107; *McCardle v. McGinley*
 (1882), 86 Ind. 538, 44 Am. Rep. 343; *Pennsylvania Co. v.*
Weddle (1885), 100 Ind. 138, 143; *Swindell v. Houck*
 (1891)), 2 Ind. App. 519, 521, 28 N. E. 736; *Sasse v. Rogers*
 (1907), 40 Ind. App. 197, 199, 81 N. E. 590; *Jenner v. Car-*
son (1887), 111 Ind. 522, 13 N. E. 44.

Appellants have assigned error in overruling their motions
 for a new trial. The court permitted appellee to prove that
 appellant, Smith, had instituted other criminal pros-
 10. ecutions against him subsequent to the election in
 1908. Appellants separately objected to this evi-
 dence as incompetent for any purpose, and that if competent
 against Smith, the court erred in not limiting its application
 to him. The cases relied on as showing the evidence incom-
 petent, are criminal prosecutions and are not in point here.
 The evidence was competent under the issues, as tending to
 show malice and want of probable cause on the part of ap-
 pellant, Smith. *Peden v. Mail* (1889), 118 Ind. 560, 562, 20
 N. E. 446; *Shanks v. Robinson* (1892), 130 Ind. 479, 30 N.
 E. 516; *Keesling v. Doyle* (1893), 8 Ind. App. 43, 45, 35 N.
 E. 126; *Freese v. State* (1903), 159 Ind. 597, 600, 65 N. E.
 915; *Dye v. State* (1891), 130 Ind. 87, 29 N. E. 771; *Tucker*
v. Hyatt (1898), 151 Ind. 332, 337, 51 N. E. 469, 44 L. R. A.
 129; *Musser v. State* (1901), 157 Ind. 423, 442, 61 N. E. 1.
 Inasmuch as the court by instruction No. 15 given at the
 request of appellee limited the application of this evidence to
 appellant, Smith, neither of the appellants has cause to
 complain of its admission in evidence. *Roberts v. Kendall*

(1891), 3 Ind. App. 339, 343, 29 N. E. 487; *Eppert v. Hall* (1892), 133 Ind. 417, 420, 31 N. E. 74, 32 N. E. 713.

The court permitted appellee to prove the amount he was obligated to pay as attorney's fees in defending himself against the alleged malicious prosecution. Such evi-

11. dence has been held competent as affecting the amount of damages. If the appellants believed the amount to be excessive or unreasonable, doubtless they would have the right to show such facts by competent evidence, but that would not affect the question of the admissibility of the evidence. *Walker v. Pittman* (1886), 108 Ind. 341, 345, 9 N. E. 175; *Noll v. Smith* (1879), 68 Ind. 188, 190; *Ziegler v. Powell* (1876), 54 Ind. 173, 178. In this case, the court instructed the jury, that in case it found for appellee, in assessing his damages, it might consider the amount the evidence showed him obligated to pay for attorney's fees, and, if it believed such sum to be reasonable, it should be made a part of the damages awarded appellee.

Errors based on the giving and refusal of instructions are discussed by appellants. The court gave thirty-eight instructions tendered by appellee, thirty-five tendered

12. by appellants and refused four tendered by appellants. There was no error in refusing instructions for those given covered all the questions at issue under every phase of the evidence.

It is urged that instruction No. 1 given at the request of appellee is erroneous in telling the jury that if the evidence established all the material allegations of either the

13. fourth or fifth or sixth paragraphs of the complaint, it should find against all the defendants. The instruction is not erroneous for each of the paragraphs states a cause of action against all the defendants. The instructions are to be considered together. By instruction No. 6 given at the request of appellee, the jury was told in substance that to find for the plaintiff, it was not necessary that it should believe that all of the defendants maliciously

and without probable cause instituted the alleged criminal prosecution against plaintiff, but that it would be warranted in finding against one or more of the defendants if it found from the evidence that either one or more of such defendants instituted said prosecution maliciously and without probable cause and that the same had terminated favorably to appellee. By this and other instructions, the jury was informed that it might find against such defendant, or defendants, only as the evidence warranted and it was fully instructed as to the proof necessary to sustain the allegations of the complaint and warrant a recovery.

The question of conspiracy suggested by the sixth paragraph of complaint was not pursued and neither side requested an instruction on that subject.

The instructions on the subject of malice and probable cause are in harmony with the decisions in this State and especially with the more recent decisions. The instructions as a whole correctly informed the jury as to the law of the case and fully set forth every right of appellant under the issues and the evidence. A careful reading of the several instructions given convinces us that no error prejudicial to appellants was committed and that the law as stated to the jury is supported by authority. *Indianapolis Traction, etc., Co. v. Henby* (1912), 178 Ind. 239, 97 N. E. 313; *Cleveland, etc., R. Co. v. Dixon* (1912), 51 Ind. App. 658, 96 N. E. 815; *Pontius v. Kimble* (1914), 56 Ind. App. 144, 104 N. E. 981; *Henderson v. McGruder* (1912), 49 Ind. App. 682, 98 N. E. 137; *Hutchinson v. Wenzel* (1900), 155 Ind. 49, 56 N. E. 845; *Lawrence v. Leathers* (1903), 31 Ind. App. 414, 68 N. E. 179.

There is evidence tending to support the verdict and the amount of damages awarded is not such as to warrant this court in holding that it is excessive: *Pontius v. Kimble, supra*. The evidence on many vital, issuable facts, was sharply conflicting. Much of it tended strongly to support the allegations of the complaint. The

evidence relating to the controversy about the school, about the removal of appellee from the office of trustee, concerning threats to put him to trouble and expense, and the institution of criminal prosecutions against him, is sufficient, if believed, not only to warrant a finding for appellee, but to justify the assessment of punitive damages. The evidence tends strongly to show that appellee had been put to great trouble, that he had been greatly annoyed and that he had incurred a liability of \$350 in employing attorneys to defend him in the trial of the criminal case against him which lasted several days.

There is evidence to support the verdict rendered. The court did not err in overruling either the motion for a *venire de novo* or the motion in arrest of judgment. No reversible error is presented. The appeal is dismissed as to appellant, Koher, and the judgment against appellants, Smith and Bowser, is affirmed.

NOTE.—Reported in 108 N. E. 108. As to what is necessary to support an action for malicious prosecution, see 12 Am. Dec. 265; 26 Am. St. 127. As to effect of judgment against one tortfeasor upon liability of the other, see 58 L. R. A. 410. Contribution between tortfeasors, see 2 Ann. Cas. 528; Ann. Cas. 1913 B 938. Action between joint tortfeasors on claim satisfied by and assigned to one of them, see 9 Ann. Cas. 519. See, also, under (1) 3 Cyc. 182; (2) 3 C. J. 441; 19 Cyc. 532; 2 Cyc. 586; (3) 3 C. J. 1007; 2 Cyc. 759; (4) 26 Cyc. 68; 38 Cyc. 488, 493, 490; (5) 38 Cyc. 490; 3 C. J. 462; 2 Cyc. 588; (6) 38 Cyc. 1877; (7) 3 C. J. 1007; 2 Cyc. 758; (8) 26 Cyc. 74; (9) 26 Cyc. 71; (10) 26 Cyc. 100, 91; 38 Cyc. 1446; (11) 26 Cyc. 102; 13 Cyc. 82; (12) 38 Cyc. 1711; (13) 38 Cyc. 1627, 1778; (14) 3 Cyc. 348, 380.

New Amsterdam Casualty Co. v. New Palestine Bank—59 Ind. App. 69.

NEW AMSTERDAM CASUALTY COMPANY v. NEW PALESTINE BANK

[No. 8,666. Filed January 27, 1915. Rehearing denied April 1, 1915.
Transfer denied May 13, 1915.]

1. **INSURANCE.—Validity of Policy.—Application.—Knowledge of Agent.—Return of Policy for Correction.—Cancellation.**—In an action on a policy of insurance against burglary, findings of the trial court, sustained by the evidence, showing that erroneous statements in the application were made by defendant's agents, for which plaintiff was in no way responsible; that the application was forwarded by such agents to defendant and the policy issued by it in conformity thereto; that such policy was delivered by such agents to plaintiff who accepted and retained it for a time and then returned it for the sole purpose of having mistakes therein occasioned by the application corrected; and that defendant's agents, at the time the application was placed, knew the truth as to the facts misrepresented therein and specifically stated that they had all the information that was necessary; show that the policy was valid as written and that its return for correction was not an offer for cancellation, or a refusal to accept the contract. p. 74.
2. **INSURANCE.—Misrepresentations in Application.—Knowledge of Agent.—Estoppel.**—Where misrepresentations in an application for insurance were made by the agent of the insurer, with knowledge of the truth, the insurer is estopped from claiming that the policy is void because of false warranties. p. 75.
3. **INSURANCE.—Misrepresentations in Application.—Knowledge of Agent.—Cancellation.**—While an insurer may cancel a policy upon learning that there were misrepresentations in the application, even though such misrepresentations were made by insurers' agent with knowledge of the facts and without fault of the insured, such policy is nevertheless capable of enforcement until it is duly cancelled and the insured notified of such fact. p. 75.
4. **INSURANCE.—Action.—Parties.—Banking Partnership.—Action in Firm Name.**—Where partners engaged in the banking business sued in the bank name on an insurance policy purporting to name the individuals composing such partnership, but which in fact did not name them all, the insurance company could not avoid liability on the theory that the policy would support a recovery only in favor of the partners named therein, since under §3413 Burns 1914, Acts 1907 p. 174, §12, the bank had power to contract in the bank name and to sue and be sued, and the policy having been issued to it made it the real party in interest and the proper party to bring the action. p. 76.

New Amsterdam Casualty Co. v. New Palestine Bank—59 Ind. App. 69.

5. **INSURANCE.—Denial of Liability.—Right to Maintain Action.**—Although a policy of insurance provides that no action thereon shall be brought until three months after making proof of loss, an action thereon may be brought immediately when liability is denied, although three months from the time of loss have not elapsed, since such denial of liability is a waiver of proof of loss. p. 76.
6. **INSURANCE.—Action.—Evidence.**—In an action on an insurance policy letters passing between the insurer and its agent relative to the issuance and subsequent cancellation of the policy were inadmissible in evidence, the same being hearsay and not binding on insured. p. 77.

From Superior Court of Marion County (88,341) ; *Charles J. Orbison*, Judge.

Action by the New Palestine Bank against the New Amsterdam Casualty Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Harvey J. Elam, James W. Fesler and John B. Elam, for appellant.

Guilford A. Deitch and Frank C. West, for appellee.

IBACH, J.—Appellee recovered from appellant upon a policy of burglary insurance. The important question in the appeal is whether the policy was in force. This question arises upon the demurrer to the complaint, upon exception to the conclusions of law upon the facts found, and upon the motion for new trial.

Briefly, the facts found by the court show that the New Palestine Bank, a private bank, operated under the statutes of this State, with authority to contract, sue and be sued in its above name, organized as a partnership, was in the year 1911, composed of four partners, John H. Binford, Edward Fink, Charles J. Richman and Henry Fralich. In February and March, 1911, this bank, through Charles J. Richman, began negotiations with H. H. Woodsmall & Company, general agents for appellant, with reference to securing a policy of burglary insurance for said bank, and in order to inform said general agents of the facts relating to the bank as an

New Amsterdam Casualty Co. v. New Palestine Bank—59 Ind. App. 69.

insurance risk, submitted to them a policy of insurance then in force with the National Surety Company, which policy contained the names of all four partners, showed that it would expire at noon on February 27, 1911, and that the bank had no other burglary insurance. Also, about March 10, 1911, Charles J. Richman, submitted to said general agents a trial application for burglary insurance in favor of the bank, for the purpose of ascertaining the premium rate of burglary insurance on the bank, and not with the present intention of applying for insurance; this application gave the names of Fink and Binford only as the partners constituting the bank, and stated that it had insurance in the National Surety Company. During these negotiations the general agents knew personally that Richman was a partner in the New Palestine Bank, and knew from the policy of insurance submitted to Woodsmall that Richman and Fralich were partners. On March 13, 1911, Woodsmall quoted a rate of \$30.80 for the first year, and \$23.10 each for the second and third years on a three-year policy. Negotiations then ceased until September 9, 1911, when Richman called at Woodsmall's office, said he was ready to take out the burglary insurance on the New Palestine Bank, and asked if he needed to fill out an application. Woodsmall told him it was unnecessary, as the trial application before filed was still with the company. No further information was given as to the bank, nor were any further inquiries made by the appellant or any of its agents. No written application was made out on September 9, 1911, by Richman, or any of the other partners. On that date Richman applied as agent of the bank to H. H. Woodsmall & Company, agents of appellant, for a policy of burglary insurance in the amount of \$5,000, to be issued for a term of three years at the rates above quoted, "insuring said bank for direct loss by burglary of money, bullion and securities feloniously, violently and forcibly abstracted from the safe or vault in said bank if entry into said safe or vault should be made

New Amsterdam Casualty Co. v. New Palestine Bank—59 Ind. App. 69.

through force or violence by the use of tools or explosives and for direct loss by damage to the said safe or vault caused by entry or attempt at entry into such safe or vault.” Thereupon Woodsmall applied immediately to appellant’s home office for said policy, but as rates had increased since March, appellant’s officers at first refused to issue a policy at the original premium quoted, but finally did so, and on September 18, 1911, issued its policy in the sum of \$5,000 to the New Palestine Bank, naming the New Palestine Bank as the assured, and mailed the policy to its agents, H. H. Woodsmall & Company, for delivery to the assured. The agents on September 21, 1911, delivered the policy to the bank, accompanied with a letter, closing with the words, “We trust you will find the same (the policy) entirely satisfactory.” This policy was for one year dated on September 18, 1911, and provided for renewals for the period of two years after that date, at the rates quoted; the policy being the first installment of a three-year contract which was to become effective on September 18, 1911. H. H. Woodsmall & Company, at the time of these negotiations, and at the time said policy was issued, were the general agents of appellant and had authority to countersign policies issued by appellant; to solicit applications for appellant; to make delivery of policies issued by appellant; and to collect premiums on policies issued by appellant. The premium for the first year for said policy was not paid by appellee, but the agents delivered the policy without making a demand for prepayment of the premium. At various times the agents had delivered policies issued by appellant to applicants therefor without prepayment of premium. The policy was accepted by appellee on September 21, 1911. On September 30, 1911, appellee returned the policy to the general agents of appellant at Indianapolis for the sole purpose of having the names of Fralich and Richman inserted in the schedule, and to have the schedule show no other insurance, and requested that the policy be returned as soon

New Amsterdam Casualty Co. v. New Palestine Bank—59 Ind. App. 69.

as the corrections were made, and the policy was not returned by appellee for cancellation or any other purpose than to have the above named corrections made. When the policy was returned by the appellee for correction, the following letter was sent therewith:

“Please find herewith policy for New Palestine Bank for correction as follows: Schedule Statement 2. Names of persons constituting same are Henry Fralich and Charles J. Richman in addition to those named in the policy. Statement 19. We carry no other insurance, it is here stated that we carry a policy in the National Surety. Please correct and return to me. Yours truly, Chas. J. Richman.”

Woodsmall forwarded the policy to the home office for alterations as requested, and between October 8 and 12, 1911, received notice from the home office that the company refused the business. The policy was retained by the home office and marked cancelled, and no other policy issued, and no demand for the premium was ever made from appellee, and appellee never tendered the premium until after the loss when the tender was refused.

At some time during the night of October 20-21, 1911, the building in which the New Palestine Bank conducted its bank business and in which the safe and vault specifically described in the policy sued on were contained, was forced open by some persons unknown to appellee and the safe and vaults of the bank were forced open and entry gained thereto by persons with burglary intent, by the use of tools and explosives, and the person or persons feloniously, violently and forcibly, abstracted during the nighttime from the safe, cash, money and bullion to the amount of \$2,487.77, and did further by the use of the tools and explosives while so making such entry into the safe and vaults, damage the safe and vaults in the sum of \$605. On October 23, 1911, appellee, by night letter, and also by written letter, mailed to appellant at its home office, notified appellant of the burglary and loss under the policy and requested that

New Amsterdam Casualty Co. v. New Palestine Bank—59 Ind. App. 69.

blanks for making proofs of loss be sent appellee at once. On October 24, 1911, appellant denied that it was liable to appellee in any amount on account of the loss and refused to furnish appellee with blanks upon which to make proofs of loss. Appellee drafted proofs of loss and forwarded same to appellant at its home office; the proofs of loss were received by appellant and were returned to appellee, appellant at the time again denying liability to appellee in any amount on account of the loss. Immediately after the loss, appellee made demand upon H. H. Woodsmall & Company for return of the policy and offered at the time to pay the premium on account of the policy, but delivery of the policy and payment of premium thereon were refused by the general agent who then and there informed appellee that the policy had been cancelled by appellant. Appellant did not at any time prior to the loss notify appellee in writing or otherwise of its desire to cancel the policy. The court's conclusion of law was that there was due appellee upon the policy \$3,092.77 principal and \$270.59 interest, from which appellant was entitled to have deducted the first year's premium of \$30.80, leaving a balance due of \$3,332.56.

Among other grounds for new trial, appellant assigned that the decision of the court was not sustained by sufficient evidence and was contrary to law. Appellant argues that there was no valid insurance contract because the minds of the parties had not met on all the material features of it,

that there was no complete proposition made by one

1. side and accepted by the other. From the findings of the court, which are supported by the evidence, it appears that the erroneous statements in the application for insurance sent to appellant on September 9, were made by appellant's agents, and not by appellee. This application, which constituted a definite proposition, was accepted by appellant's writing a policy based thereon, which in all material respects conformed to the application, and mailing it to appellant's agents who delivered it unconditionally to

New Amsterdam Casualty Co. v. New Palestine Bank—59 Ind. App. 69.

appellee. Appellee retained and accepted this policy, but appellant's agents having made misstatements in certain representations, appellee returned the policy in order to have these mistakes corrected and for no other purpose. According to the facts found, appellees were not responsible for these mistaken representations, but appellant's agent was responsible therefor. The court found, and the evidence showed, that the agent not only had personal knowledge of the truth as to the facts misrepresented, but that he specifically told appellee's agent that he did not need any more information, and had all that was necessary. The policy was valid as written. Its return for correction was not an offer for cancellation, or a refusal to accept the contract. See *Equitable Life Assur. Soc. v. Perkins* (1908), 41 Ind. App. 183, 80 N. E. 682; *Swing v. Marion Pulp Co.* (1911), 47 Ind. App. 199, 93 N. E. 1004; *Krause v. Equitable Life Assur. Soc.* (1894), 99 Mich. 461, 58 N. W. 496; *Baldwin v. Pennsylvania Fire Ins. Co.* (1903), 206 Pa. St. 248, 55 Atl. 970.

Since the misrepresentations were made by the agent of appellant, with knowledge of the truth, his knowledge estops the company from claiming that the policy was void

2. because of false warranties. *German-American Ins. Co. v. Yeagley* (1904), 163 Ind. 651, 71 N. E. 897, 2 Ann. Cas. 275; *Phoenix Ins. Co. v. Allen* (1887),
3. 109 Ind. 273, 10 N. E. 85; *Metropolitan Life Ins. Co. v. Johnson* (1912), 49 Ind. App. 233, 94 N. E. 785;

5 Elliott, Contracts §§4185, 4186, and cases cited. It is probable that upon receiving notice of the misstatements in the application, the insurer would have ground to cancel the policy upon notice to the insured, and in fact, the policy reserves the absolute right to the insurer to cancel the policy at any time, upon written notice to the insured and tender of the unearned portion of the premium paid. But in this case notice of cancellation was never served in the manner provided in the policy, and no notice of any kind of the

New Amsterdam Casualty Co. v. New Palestine Bank—59 Ind. App. 69.

attempted cancellation was brought to appellee until after the loss. The policy was in force at the time it was returned for correction, and would remain in force until duly cancelled. No attempted cancellation would be effective until brought to the notice of appellee. We therefore must conclude that the policy was in force at the time of the loss.

It is also urged that the policy, even if valid, will support a recovery only in favor of two of the partners, and not in favor of all of them. In this we do not agree.

4. The policy was not made out to Fink and Binford, but to the New Palestine Bank, which had powers to contract in such name, to sue and be sued, under §3413 Burns 1914, Acts 1907 p. 174, §12. Under this section, a judgment against the bank binds all the persons interested in the bank, and conversely, a judgment in its favor would benefit all persons interested. Since the policy was issued to the bank, it is the real party in interest, and the proper party to bring the action.

Although one condition of the policy provides that no suit shall be brought until three months after the particulars of the loss have been furnished to the insurer, this

5. action, although commenced in less than three months after the time of the loss, is not prematurely brought, for by denying liability, proofs of loss were waived, and the action might be brought immediately. *Phoenix Ins. Co. v. Flowers* (1910), 124 S. W. (Ky.) 403; *Miles v. Casualty Co.* (1909), 115 N. Y. Supp. 1; *Depue v. Travelers Ins. Co.* (1909), 166 Fed. 183; *Jensen v. Palatine Ins. Co.* (1908), 81 Neb. 523, 116 N. W. 286; *Jennings v. Brotherhood Acc. Co.* (1908), 44 Colo. 68, 96 Pac. 982, 130 Am. St. 109, 18 L. R. A. (N. S.) 109; *Ohio Farmers Ins. Co. v. Vogel* (1906), 166 Ind. 239, 76 N. E. 977, 117 Am. St. 382, 3 L. R. A. (N. S.) 966, 9 Ann. Cas. 91; *Orient Ins. Co. v. Kaptur* (1911), 176 Ind. 308, 95 N. E. 230.

There was no error in the court's excluding from admission in evidence exhibits 21, 22 and 23, for these were letters

Ripley v. Baldwin—59 Ind. App. 77.

passing between appellant's agent Woodsmall and
6. appellant relative to the issuing of the policy and its attempted cancellation, and were, as to appellee, hearsay, and could not bind it.

No error appears, and the judgment is affirmed.

NOTE.—Reported in 107 N. E. 554. As to the law of burglary and theft insurance, see 46 L. R. A. (N. S.) 561. Waiver of conditions in insurance policy by insurer's knowledge of existing facts, see 2 Ann. Cas. 280; 18 Ann. Cas. 688. See, also, under (4) 30 Cyc. 560, 561; (6) 38 Cyc. 1915 Anno. 277-new.

RIPLEY v. BALDWIN.

[No. 9,037. Filed March 11, 1915. Rehearing denied March 31, 1915. Transfer denied May 13, 1915.]

1. *APPEAL.—Review.—Unauthorized Change in Record.—Dismissal.*—Where appeal was granted upon the filing of an appeal bond within thirty days, but the surety was not named on the record, and appellant attempted to perfect a term time appeal by filing the bond within the required time, and it was made to appear that after the transcript was filed the order book entry and the transcript were each altered, without *nunc pro tunc* proceeding, so as to show the naming of such surety, the appeal was not perfected as a term time appeal, and the time having elapsed for perfecting a vacation appeal, a dismissal was required. pp. 78, 79.
2. *COURTS.—Records.—Filling Blanks.*—The law provides an adequate way for correcting records, and the mere fact that blank spaces are left in a record does not warrant the changing of the record by filling such spaces without authority from the court. p. 79.

From Superior Court of Marion County (93,889) ; *Charles J. Orbison*, Judge.

Action by James H. Baldwin against Warwick H. Ripley. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

Warwick H. Ripley and *William W. Spencer*, for appellant.

W. H. Ogborn, for appellee.

PER CURIAM.—Judgment in this case was rendered on June 19, 1914. On the same day a motion for a new trial was filed. On June 26, 1914, the motion for a new trial was overruled, on which date an appeal was prayed to the Appellate Court and sixty days given to file bill of exceptions. We copy from the record the following: "Now defendant prays appeal to the Appellate Court which is granted upon filing an appeal bond in the sum of \$125.00 with Charles D. Meigs as surety thereon within 30 days." The name of the surety, Charles D. Meigs, is written in ink, the remainder of the transcript being typewritten. Afterwards on July 9, 1914, in vacation of said court the following entry was made: "Comes now the defendant and files his appeal bond in the sum of One Hundred and twenty-five (\$125.00) dollars with Charles D. Meigs, as surety thereon, and which said bond is now approved by the court and is as follows". On July 16, 1914, defendant filed his bill of exceptions which was approved by the court. The record was filed on July 25, 1914, and the cause submitted on August 24, 1914.

It is disclosed by the affidavit and motion filed that at the time of making the order fixing the amount of the bond and the name of the surety, that the name of the surety was not inserted in the order entered by the lower court, but the space was left blank. It is shown by the affidavit of William H. Ogborn that afterward, on January 6, 1915, the date of filing his motion to dismiss the appeal, the name of Charles D. Meigs as surety on the bond given in the cause did not appear in the records of the Marion Superior Court, but that it had been inserted since that time. It is also stated that the transcript filed in this court has been changed since that time by the insertion of the name of Charles D. Meigs as surety on the bond. These facts are not disputed, but are supported by the affidavit of Mary Anderson, who states that she was the duly appointed deputy clerk of Marion County, who made the transcript on appeal; that,

Indianapolis Outfitting Co. v. Brooks—59 Ind. App. 79.

at the time she made the transcript, the name of the surety on the appeal bond did not appear on the transcript, but the space was left blank; that since the transcript was made she had not at any time filled in the name of Charles D. Meigs as surety, and does not know of her own personal knowledge who filled the blank space in the transcript with the name of the surety. It does not appear from the record that any order *nunc pro tunc* was made by the Marion Superior Court to correct the record in any manner, neither does it appear that any application was ever made or any order granted by this court to correct the transcript. While

in this case it appears that the record was changed

2. without intentional wrong, this court can not give its sanction to the practice of changing the records in this manner. The law provides an adequate way in which such corrections can be made, and the mere fact that blank spaces were left in the record does not warrant the changes made without authority from the court.

As the facts disclose, the time for taking a vacation appeal has elapsed. When the original motion to dismiss this appeal was passed on by this court, the attention of

1. the court was not called to the manner in which the record was changed. The motion to reinstate the motion to dismiss this appeal is sustained, and appeal dismissed.

NOTE.—Reported in 108 N. E. 209 See, also, under (1) 3 C. J. 1066; 2 Cyc. 803; (2) 34 Cyc. 591.

INDIANAPOLIS OUTFITTING COMPANY v. BROOKS.

[No. 8,624. Filed May 14, 1915.]

APPEAL.—*Record.*—*Bill of Exceptions.*—*Dismissal.*—A bill of exceptions, to become a part of the record, must be signed by the trial judge and duly filed with the clerk or in open court, which is a judicial act that can neither be dispensed with nor aided by the certificate of the shorthand reporter; hence where the

Indianapolis Outfitting Co. v. Brooks—59 Ind. App. 79.

bill of exceptions did not appear to have been signed by the trial judge, or filed as required, and the only question sought to be raised related to the admission of evidence, there was nothing before the court for determination and a dismissal of the appeal was required.

From Superior Court of Marion County (88,031); *Clarence E. Weir*, Judge.

Action by Sparks L. Brooks against the Indianapolis Outfitting Company. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

Harry C. Hendrickson, for appellant.

Thomas D. McGee, Edward D. Reardon and James H. Drew, for appellee.

HOTTEL, C. J.—This is an appeal from a judgment in appellee's favor for \$124.96 rendered by the Marion Superior Court in an action begun by appellee before a justice of the peace. The only error assigned is the overruling of appellant's motion for a new trial, and the only ground upon which such motion is based relates to an alleged error of the court in refusing to strike out certain testimony of the appellee.

Appellee insists that no question is presented by the appeal for the reason that the evidence is not in the record. There is in the record what purports to be a bill of exceptions setting out certain parts of the evidence given at the trial of the cause and certified to by the reporter, but such bill of exceptions is not signed by the trial judge and there is no affirmative showing that it was ever filed with the clerk of the trial court. A bill of exceptions must be authenticated by the signature of the trial judge and must be filed in the office of the clerk of the court or in open court. *Rose v. Chicago, etc., R. Co.* (1914), 181 Ind. 658, 105 N. E. 241; *Hoffman v. Isler* (1912), 49 Ind. App. 284, 97 N. E. 188; *Daugherty v. Reveal* (1913), 54 Ind. App. 71, 102 N. E. 381. "The certificate of the shorthand reporter is not an essential and does not determine the sufficiency of a bill

Farabee v. Warren—59 Ind. App. 81.

of exceptions. It is a judicial act and is determined by the trial judge." *Daugherty v. Reveal, supra*. As the record comes to us, no question is presented by the appeal and it is therefore dismissed.

NOTE.—Reported in 108 N. E. 867. See, also, 3 Cyc. 43, 45; 2 Cyc. 1083.

FARABEE v. WARREN.

[No. 9,161. Filed May 14, 1915.]

APPEAL.—*Review.—Bill of Exceptions.—Failure to File in Time.*—

When time for filing a bill of exceptions is granted it must be filed within that time, so that where it appeared that the bill of exceptions was not presented to the trial judge until after the expiration of the time granted for filing, and no extension of the time originally granted was shown, the bill was not in the record so as to present any question thereon for consideration.

From Randolph Circuit Court; *James S. Engle*, Special Judge.

Action by Laura A. Warren against John W. Farabee. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

Shockney & Baker, for appellant.

Focht & Hutchins, for appellee.

PER CURIAM.—A motion to dismiss this appeal is properly presented, appellee having entered a special appearance therefor. The facts disclosed by the record show that the final judgment was entered on July 29, 1914, being the seventy-fifth judicial day of the May term, 1914, of the Randolph Circuit Court. In the same entry showing the final judgment, sixty days' time was given appellant within which to file a general bill of exceptions containing the evidence, and sixty days' time given within which to file an appeal bond.

Farabee v. Warren—59 Ind. App. 81.

It is insisted by appellee that the transcript does not show that any extension of time for the filing of the bill of exceptions was ever given. This is not controverted by appellant. The bill of exceptions is shown by the record to have been presented to and signed by the special judge of the Randolph Circuit Court on December 5, 1914, being the thirtieth judicial day of the November term, 1914, of the court, and more than sixty days from the time final judgment was entered. It is not claimed that the bill of exceptions was ever presented to the judge of the Randolph Circuit Court within the sixty days allowed by the court within which to file and present the same. When time is granted to file a bill of exceptions, the bill must be presented to the judge within the time granted. *Firemen's Fund Ins. Co. v. Finkelshtein* (1905), 164 Ind. 376, 73 N. E. 814; *Taylor v. Schradsky* (1912), 178 Ind. 217, 97 N. E. 790; *Marks v. Mariotte* (1912), 51 Ind. App. 281, 99 N. E. 501.

The only question attempted to be presented in the assignment of error is that the court erred in overruling the motion for a new trial, for the reason that the judgment of the court is not supported by sufficient evidence. Appellant's counsel insist that the term time appeal was abandoned, and that it was attempted to be perfected as a vacation appeal. No question is presented under any method of appeal.

The evidence not being properly in the record for the reasons above stated, no question is presented for consideration, and said appeal is dismissed.

NOTE.—Reported in 108 N. E. 868. See, also, 3 Cyc. 46, 37.

Jeffersonville School Tp. v. School City, etc.—59 Ind. App. 83.

JEFFERSONVILLE SCHOOL TOWNSHIP v. SCHOOL CITY
OF JEFFERSONVILLE ET AL.

[No. 8,965. Filed May 25, 1915.]

1. SCHOOLS AND SCHOOL DISTRICTS.—*Illegal Transfer of Pupils.—Injunction.*—An action by a school township to enjoin the county superintendent from illegally transferring township pupils to the schools of a school city, and to enjoin the latter from accepting such transfers and charging the *per capita* cost to the township, can not be maintained, since, if the transfers are illegal, such fact would be available as a complete defense in any action against the school township for the cost of educating such pupils in the school city. p. 84.
2. INJUNCTION.—*Right to Relief.—Legal Remedy.*—Where there is a complete and adequate remedy at law, relief will not be granted by injunction. p. 84.

From Clark Circuit Court; *Thomas B. Buskirk*, Special Judge.

Action by Jeffersonville School Township of Clark County, against the School City of Jeffersonville and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Laurent Douglass, for appellant.

George H. Voigt, for appellees.

IBACH, P. J.—In appellant's complaint it was alleged that fifty-seven school children of appellant school township had been transferred by appellee county superintendent to the schools of appellee school city, without any application having first been made to the township trustee of appellant for transfers, and appeal on his refusal to the county superintendent, and that these children were being taught in the schools of appellee school city and would continue to be so taught, although appellant was maintaining fully equipped schools in the township convenient to the children, and that appellee school city would continue to receive said children who were illegally transferred to it, and to teach them, and

Jeffersonville School Tp. v. School City, etc.—59 Ind. App. 83.

would charge against appellant the cost of maintaining said children in school, and sue for the same, and that appellee county superintendent has said that he would continue to transfer children to appellee school city's schools, whether or not they had first applied to appellant's township trustee, and a proper appeal taken. It was prayed that appellee school city be enjoined from continuing to teach such children illegally transferred, and from charging against appellant any sums or amounts of the *per capita* cost of maintaining the schools of appellee where such children are attending, or will hereafter attend, and that appellee Samuel L. Scott be enjoined from issuing any further transfers, except on appeal to him as provided by law.

Error is assigned for reversal in sustaining the separate demurrers of each appellee to the complaint. One of the grounds of demurrer stated in the memorandum of

1. each appellee was that appellant has an adequate and complete remedy at law. For the purposes of the demurrer, appellees admit that under §§6449, 6451 Burns 1914, Acts 1909 p. 173, Acts 1901 p. 448, the county superintendent of schools has no right to transfer children from one school corporation to another, except on appeal from a decision of the township trustee denying a transfer. But appellees contend that even if the children were transferred illegally, appellant has an adequate remedy at law for the wrong; that if the children were not properly transferred, the school board of appellee school city can not recover from appellant for their tuition; and if suit is brought to recover, a defense on the ground of the matters alleged in the complaint for injunction would be a complete bar. In this we agree with appellees. It is an elementary
2. principle of equity, that where there is a complete and adequate remedy at law, relief will not be granted by injunction. We believe this principle fully applies here.

Judgment affirmed.

Fender v. Phillips—59 Ind. App. 85.

NOTE.—Reported in 108 N. E. 966. As to injunction against illegal acts of municipal and other public corporations, see 2 Am. St. 92. See, also, under (1) 35 Cyc. 1115; (2) 22 Cyc. 769.

FENDER, ADMINISTRATOR, v. PHILLIPS, ADMINISTRATOR.

[No. 9,095. Filed May 25, 1915.]

1. PLEADING.—*Demurrer to Answer in Abatement.*—Form.—A demurrer to an answer or plea in abatement that it does not "state facts sufficient to constitute a cause of defense", is bad in form. p. 91.
2. APPEAL.—*Review.*—*Harmless Error.*—*Ruling on Demurrer to Answer in Abatement.*—The sustaining of a defective demurrer to an answer in abatement of a proceeding addressed to the probate jurisdiction of the court to procure the confirming of a contract of settlement, was harmless, where the answer in abatement failed to disclose any infirmity that was ground for abating the proceeding. p. 91.
3. EXECUTORS AND ADMINISTRATORS.—*Settlement of Claims.*—*Contract Between Administrator and Guardian.*—*Consideration.*—Where the petition to the court, asking the confirmation of a contract of settlement entered into between an administrator with the will annexed and the guardian of decedent's husband, disclosed that the guardian was insisting that under a certain item of the will the decedent's estate was required to pay all accrued expenses for the maintenance of his ward, that there was some question as to the right of election on behalf of the ward to take under the law instead of under the will, and that there was controversy as to the relative rights of the estates represented by the administrator and the guardian, respectively, all of which matters were compromised in such contract, a sufficient consideration for entering into the contract was shown. p. 91.
4. EXECUTORS AND ADMINISTRATORS.—*Guardian and Ward.*—*Settlement of Claims.*—*Confirmation of Contract.*—*Legatees as Parties.*—Where the petition for the confirmation of a contract of settlement between an administrator with the will annexed and a guardian, whose ward was the husband of the testatrix and a legatee under the will, disclosed that the guardian was about to renounce the provisions of the will and claim under the law, and that to avoid this and to avoid litigation the contract of settlement was entered into, the contract was one within the

authority of the administrator and guardian to make, and it was not essential that the legatees be made parties thereto or to the proceeding to confirm same. pp. 92, 94.

5. EXECUTORS AND ADMINISTRATORS.—*Settlement of Claims.—Authority.*—An administrator may settle claims against the estate by compromising them, and should be allowed any sum paid out in so doing, if he has acted in good faith and with the care and judgment of a man of ordinary prudence and sagacity, and, as a general rule may adjust and settle claims due the estate without the consent of the next of kin; but in all cases, if the administrator has acted without obtaining the authority and direction of the court, he has the burden of proving good faith and diligence and that the act was beneficial to the estate. p. 92.
6. APPEAL.—*Review.—Ruling on Demurrer to Answers.*—Where all the evidence that could be admitted as a defense to a petition for the confirmation of a settlement contract entered into between an administrator and a guardian was admissible under the general denial, there was no error in sustaining demurrers to paragraphs of special answer. p. 94.
7. EXECUTORS AND ADMINISTRATORS.—*Contract of Settlement with Guardian.—Petition for Confirmation.—Intervention by Guardian.*—Where an administrator with the will annexed entered into a contract with a guardian of a legatee for the compromise and settlement of claims of the guardian, pursuant to which the guardian procured an order of the court having jurisdiction of the guardianship in confirmation thereof, and thereafter while the petition of the administrator for confirmation was pending in the court having jurisdiction over the estate represented by him, the legatee died, whereupon such administrator attempted to enter a dismissal of his petition and refused to seek a confirmation, the guardian had a sufficient interest in the contract to intervene and ask that the contract be confirmed. p. 94.
8. ACTION.—*Dismissal by Party.—Statutes.*—Under §339 Burns 1914, §334 R. S. 1881, providing that a plaintiff may dismiss his action in vacation, the judgment of the court at the next term is necessary to complete such dismissal; hence an attempted dismissal in vacation by an administrator of his petition for the confirmation of a contract entered into was ineffectual where judgment of dismissal was not thereafter rendered by the court. p. 95.
9. EXECUTORS AND ADMINISTRATORS.—*Compromise of Claim with Guardian.—Confirmation of Contract.—Discretion of Court.*—Where a contract of settlement entered into between an administrator with the will annexed and the guardian of an insane legatee provided for the relinquishment of certain rights contended for by the guardian and showed that it was entered into

Fender v. Phillips—59 Ind. App. 85.

to avoid litigation, etc., the confirmation thereof was a matter largely within the discretion of the court, and in view of evidence to sustain the petition, and the absence of anything to show an abuse of discretion, the judgment rendered in confirmation thereof can not be disturbed. p. 95.

From Morgan Circuit Court; *John C. McNutt*, Special Judge.

Proceeding for the confirmation of a contract of settlement entered into between William Fender, administrator with the will annexed of Caroline A. Miller, deceased, and Walker Miller, guardian of Edward A. Miller. Pending such proceeding Edward A. Miller died, and Stephen D. Phillips was appointed administrator of his estate. From a judgment confirming the contract, this appeal is prosecuted. *Affirmed.*

Inman H. Fowler and *Homer Elliott*, for appellant.

Willis Hickam, *Herbert Hickam* and *S. C. Kivett*, for appellee.

MORAN, J.—William Fender, administrator with the will annexed of the estate of Caroline A. Miller, deceased, and Walker Miller, guardian of Edward A. Miller, a person of unsound mind, entered into a contract adjusting certain claims and differences growing out of their trust estates, respectively. This appeal is from an order and judgment of the lower court confirming the contract of settlement and adjustment.

Caroline A. Miller departed this life December 13, 1910; she left no children or their descendants, no father or mother surviving her, but left surviving her Edward A. Miller, her husband, and brothers and sisters, whom she made beneficiaries in her will. Items Nos. 3 and 4 of the last will and testament of Caroline A. Miller are as follows:

“Item 3. Whereas my present husband is indebted to me for money advanced and mortgage notes executed to me on the last day of March, 1895, in the sum of \$900, drawing 8 per cent per annum from date until paid, and

money advanced at different dates in the sum of \$1,152.28. * * * Item 4. It is my will that as long as my present husband lives he is to have the use of the above amount of money for his support, but at his decease the unexpended balance to be accounted for to my heirs at law."

The terms of the settlement between the administrator and guardian heretofore referred to were reduced to writing and signed by William Fender as administrator of the estate of Caroline A. Miller, and Walker Miller as guardian of Edward A. Miller, a person of unsound mind. The part of the contract that is material to the questions presented for review is:

"Now, therefore, to avoid litigation and expense of administration and to save said estate from waste, it is hereby agreed, by and between the said administrator and the said guardian that all differences existing between them as to their respective rights in the assets of said estate are hereby adjusted, settled and compromised on the following terms and conditions, to wit: The said guardian agrees to take in full interest of all his rights, title and interest and claim, in and to the assets of said estate, two notes, one being in the sum of \$1,000 together with accrued interest thereon and signed by Philip Coble, and one being in the sum of \$300 with accrued interest thereon and signed by Walter S. Duenweg and others, and the balance to be paid in cash in such sum that the total of these notes, together with the accrued interest thereon to the date of this contract, and the said sum paid in cash shall equal the sum of \$1,500, the same being the amount agreed upon between said parties to be paid by said administrator to said guardian as the full interest of said Edward A. Miller, in the assets of said estate of Caroline A. Miller, deceased. It is provided that said guardian shall pay to said estate of Caroline A. Miller, his *pro rata* share of any debts that were contracted by Caroline A. Miller prior to her marriage with said Edward A. Miller, and which may be filed against her estate, and which may be legally enforced against the same, and the said administrator hereby agrees to deliver the two notes above described and the balance in cash, to wit: The sum of \$—— dollars upon the approval of this contract and settle-

ment by the probate judge of the Vigo Circuit Court of Vigo County, Indiana, and the approval of the same by the judge of the Owen Circuit Court of Owen County, Indiana. It is further agreed by and between the parties that this contract and settlement shall be reported to the respective courts of said respective parties doing probate business in the respective counties, and that the same shall be entered of record and an order of said court made, making said settlement firm and effectual between the parties."

On March 24, 1911, by proper petition the above contract was presented to the Vigo Circuit Court asking advice of the court and an order directing the guardian to elect for his ward to take under the law instead of under the will of Caroline A. Miller, deceased. The court ordered the guardian to file his election to take under the law instead of under the will and approved and confirmed the acts of the guardian as to the contract of settlement. On March 27, 1911, a petition was filed in the Owen Circuit Court by appellant, administrator of the estate of Caroline A. Miller, deceased, setting forth the condition of the estate, and that a controversy existed as to the interest that Edward A. Miller, who was under guardianship, should take in his wife's estate, and to avoid litigation a contract of settlement had been entered into between the administrator and the guardian and the same was asked to be confirmed by the court. The relatives of Edward A. Miller appeared to this petition and objected to any action being taken until they could file proper proceedings in the Vigo Circuit Court to remove the guardian, and have a guardian appointed in the Owen Circuit Court, where the said Edward A. Miller was a resident. While the above petition was pending for confirmation by the court, and the one in the Vigo Circuit Court for the removal of the guardian, Edward A. Miller died. Immediately after his death, and before letters of administration were issued to appellee to administer upon the estate of Edward A. Miller, deceased, appellant caused to be entered upon the docket of the Owen Circuit Court

in vacation, the following: "Comes now William Fender, administrator by I. H. Fowler, attorney, and withdraws the agreement of settlement between said Walker Miller, guardian of Edward A. Miller, insane, and said Fender, administrator of Caroline A. Miller, deceased, and said administrator now dismisses his petition for the confirmation of said agreement September 2, 1911. I. H. Fowler, Attorney."

Before any action had been taken by the Owen Circuit Court as to the granting or dismissing of the petition of William Fender, administrator of the estate of Caroline A. Miller, praying for the confirmation of the contract of settlement, appellee was appointed administrator of the estate of Edward A. Miller, and filed his petition asking the Owen Circuit Court to confirm the contract as theretofore prayed for by appellant. To this petition appellant addressed a plea in abatement, to which a demurrer was sustained. In addition to an answer of general denial, appellant filed eleven paragraphs of affirmative answer; to all of which, except the sixth, which was an answer of no consideration, demurrers were filed and sustained. A reply in general denial to the sixth paragraph of answer closed the issues. Trial was had in the Morgan Circuit Court, where the cause had been venued and a finding and judgment for appellee confirming the contract of settlement; from the finding and judgment thus entered, appellant prosecutes this appeal, and assigns as error: (1) error in sustaining appellant's demurrer to appellee's separate plea in abatement; (2) error in overruling appellant's demurrer to appellee's petition; (3) error in sustaining appellee's demurrers to paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11 and 12 of the answer of appellant; (4) error in overruling appellant's motion for a new trial.

The objection raised by appellant under "Propositions and Authorities", as to the first error assigned is, that the demurrer to the plea in abatement is defective in form and

the court erred in sustaining the same. That part 1. of the demurrer to which the objection is specifically addressed is as follows: "That neither of said paragraphs states facts sufficient to constitute a cause of defence". It may be regarded as a well-settled rule of practice in this State, that a demurrer to a plea in abatement in the language above is bad in form. *Kunkle v. Coleman* (1910), 174 Ind. 315, 92 N. E. 61; *State v. Roberts* (1906), 166 Ind. 585, 77 N. E. 1093; *Rush v. Foos Mfg. Co.* (1898), 20 Ind. App. 515, 51 N. E. 143; *State v. Tam* (1912), 178 Ind. 313, 99 N. E. 424.

The pleading in this case asking the approval of the court of an adjustment and settlement of the alleged differences between the two estates, invoked the probate

2. jurisdiction of the court. As to whether the pleading was such that a plea in abatement would lie, we need not decide, for an examination of the various paragraphs of the plea in abatement fails to disclose that there was a want of jurisdiction of either the subject-matter or the person or any other infirmity that was ground for abating the proceedings. The pleading being insufficient, the sustaining of a demurrer thereto, which is defective in form, is harmless. *Town of Knox v. Golding* (1910), 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986; *Spaulding v. Mott* (1906), 167 Ind. 58, 76 N. E. 620.

Appellant's counsel states that the question upon which the decision of this court must ultimately depend is presented by the second assignment of error, viz., the

3. overruling of appellant's demurrer to appellee's petition. The objection raised to the petition is that the legatees should have been parties to the contract of settlement and are necessary parties to the petition seeking a confirmation thereof, and that the administrator had no authority to contract in this behalf without the consent of the legatees. As to the authority of the administrator to enter into the contract of settlement, the petition discloses

Fender v. Phillips—59 Ind. App. 85.

that the guardian was insisting on behalf of his estate that the estate of Caroline A. Miller was obliged to pay, by reason of the fourth item of the will, all the expense that had accrued by reason of the maintenance and care of his ward, during the time he had been under guardianship, which amounted to something like \$1,000. There was the further question under consideration at the time and before the contract was entered into in reference to the election of the guardian to take under the law instead of under the will of Caroline A. Miller. There was a controversy as to the relative rights of the estates represented by the administrator and the guardian, respectively, and it is a familiar principle of law that the compromise of a matter in dispute is a sufficient consideration to support a contract when the same is entered into in the absence of fraud. *Long v. Shackelford* (1853), 25 Miss. 559; *American Cent. Ins. Co. v. Sweetser* (1888), 116 Ind. 370, 19 N. E. 159; *Chicago, etc., R. Co. v. Katzenbach* (1889), 118 Ind. 174, 20 N. E. 709; *Hutton v. Stoddart* (1882), 83 Ind. 539. So there was a sufficient consideration to start with for the entering into of a contract of settlement.

The petition further discloses that preceding the entering into of the contract, the administrator of the estate of Caroline A. Miller had knowledge that the guardian

4. was contemplating renouncing the provisions of the will in behalf of his ward, and if so, it was understood by the administrator and the guardian, that he would be entitled to one-third of the estate of Caroline A. Miller, which amounted to \$4,600. So it was to the advantage of the estate to adjust the matter and avoid litigation; and no dissatisfaction was expressed on the part of the administrator until after the death of Edward A. Miller, when the administrator attempted to dismiss the petition that he had theretofore filed asking for a confirmation of the
5. contract. An administrator may effect the settlement of claims against the estate by compromising them,

and should be allowed any sum paid out by him in so doing, if he has acted in good faith and with the care and judgment of a man of ordinary prudence and sagacity. 18 Cyc. 580, f; *Cook v. Richardson* (1900), 178 Mass. 125, 59 N. E. 675; *Bruner's Appeal* (1868), 57 Pa. St. 46; *Parker v. Providence, etc., Steamship Co.* (1891), 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. 869, 14 L. R. A. 414. In this State, it has been held that an administrator has a general, and in many respects an absolute, power over the debts due the estate, which he represents, and he may exercise acts of ownership over the same, and as to claims that are collectible by the estate, he may as a general rule adjust and settle the same without the consent of the next of kin. *Underwood v. Sample* (1880), 70 Ind. 446; *Latta v. Miller* (1887), 109 Ind. 302, 10 N. E. 100; *Pittsburgh, etc., R. Co. v. Gipe* (1903), 160 Ind. 360, 65 N. E. 1034; *Foot v. Great Northern R. Co.* (1900), 81 Minn. 493, 84 N. W. 342, 83 Am. St. 395, 52 L. R. A. 354. The above refers to debts due the estate and claims for the death of the administrator's decedent by negligence or otherwise; the latter of which is not really an asset of the estate and as a usual thing goes to the next of kin or to whom the statute designates. And hence the above propositions are applicable to the cause under consideration, which involves a claim due from the estate only in so far as they throw light on the general power and the authority of the administrator. In *Latta v. Miller, supra*, it was held that the administrator had the power, in good faith, and upon sufficient consideration, to release one of the makers of a promissory note executed to him in his fiduciary capacity from liability for the balance of the note remaining unpaid. The court in the cause of *Underwood v. Sample, supra*, held that the executor had the power to extend the time of payment of a debt due the estate; and in the absence of fraud or collusion, had the power to release debts and exercise general authority over them in regard to their security and collection. In *McCleary v. Chipman*

(1903), 32 Ind. App. 489, 68 N. E. 320, the court in speaking of the authority of an executor said, "The executor of the Hall estate had authority to release the Hall judgment. There is no finding that it was executed without consideration. It is not shown there was any fraud or collusion or wasting of the assets of the estate." "An executor or administrator has the power to settle or compromise claims for or against the estate * * * and a settlement made by him can be set aside only upon proof of bad faith or fraud." *Scully v. McGrath* (1911), 201 N. Y. 61, 94 N. E. 195. "There is a difference, as regards the effect, between a compromise or composition made in the exercise of the common-law authority and one made with consent of the probate court under the statute, in that the burden of proving good faith and diligence, or that the act was beneficial to the estate, rests on the personal representative, where he exercises his common-law authority, while an order of the probate court, legally obtained and complied with, is an absolute protection to him." 11 Am. and Eng. Ency.¹

Law (2d ed.) 930. In the light of the authorities

4. and the facts presented by the petition, we are of the opinion that the contract was clearly within the power of the administrator and the guardian to have entered into, and that the legatees need not be parties to the same or to a proceeding seeking confirmation thereof. The prime object of the petition was to procure a confirmation of the contract by the court, as provided by its terms.

The nature of the proceedings is such that all the evidence that could have been admitted as a defence to the petition was admissible under the answer of general

6. denial, in addition, however, to the answer of general denial there remained in the record an answer of no consideration. There was no error committed by the trial court in sustaining a demurrer to each of the

7. other affirmative answers. The guardian had a sufficient interest in the contract after it had been con-

firmed on the part of his ward's estate by the Vigo Circuit Court and filed for confirmation by the administrator in the Owen Circuit Court, to intervene and ask that it be confirmed when the administrator refused so to do.

8. The attempt of the administrator to dismiss his petition asking for a confirmation of the contract in vacation was ineffectual. The statute provides "The plaintiff may dismiss his action in vacation, by filing with the clerk a writing to that effect. The clerk shall enter such written dismissal in the order-book, and the court render judgment accordingly * * *." §339 Burns 1914, §334 R. S. 1881. The judgment of the court at the next term was necessary to complete the dismissal; no judgment of this character was entered. *Courtney v. Courtney* (1892), 4 Ind. App. 221, 30 N. E. 914; *McLain v. Draper* (1887), 109 Ind. 556, 8 N. E. 910.

The evidence fully supports the allegations of the petition. After the contract reached the court for confirmation in the manner it did, its confirmation by the court

9. impresses us as being largely within its discretionary power, and having confirmed the same, there can be no reversal of the court's judgment, unless there was an abuse of the discretionary power of the court, which the record fails to disclose. As to the other questions presented, we have examined the same, and find no error—that was prejudicial to the rights of the appellant. Judgment affirmed.

NOTE.—Reported in 108 N. E. 971. As to when compromise and settlement is enforceable on payment of part of a demand, see 100 Am. St. 412, 429. On the compromise by personal representative of claim due estate, see 14 L. R. A. 414. See, also, under (1) 31 Cyc. 319; (2, 6) 31 Cyc. 358; (3) 8 Cyc. 505; (4) 18 Cyc. 580; 21 Cyc. 74; (7) 31 Cyc. 517; (8) 14 Cyc. 410; (9) 3 Cyc. 325.

CITIZENS NATIONAL BANK v. KERNEY, ADMINISTRATOR.

[No. 8,406. Filed January 12, 1915. Rehearing denied April 14, 1915. Transfer denied May 25, 1915.]

1. **APPEAL.—Assignment of Errors.—Waiver.—Briefs.**—An assignment of error challenging the sufficiency of the complaint is waived, if not presented by appellant's brief. p. 103.
2. **APPEAL.—Review.—Issues.—Equitable Set-Off.—Subsequent Answer of Statutory Set-Off.**—Where defendant bank had applied the amount of a deposit made by plaintiff's decedent as a credit on decedent's unmatured note which the bank then held, and, in an action by plaintiff to recover the amount of the deposit, pleaded an equitable set-off, defendant's filing of a further paragraph of answer, after the note had matured, of statutory set-off based on such note, in effect took the former out of the case, or at least so shaped the issues that the disposition of any question affecting the equitable set-off was rendered unimportant to defendant. p. 103.
3. **APPEAL.—Questions Reviewable.—Decision of Trial Court.—Conclusiveness.**—Where the question involved was whether a note executed by appellee's decedent was void as having been executed as a secret preference to appellant in effecting a composition with decedent's creditors, and appellant contended that it was executed voluntarily after the composition with creditors had been consummated, the decision of the trial court in favor of appellee must be deemed conclusive unless it can be said that there was no probative evidence in its support. p. 104.
4. **COMPOSITIONS WITH CREDITORS.—Essentials.—Secret Preferences.**—Where creditors unite in a composition agreement with their common debtor, the utmost good faith must be observed by all the parties, and any secret promise by the debtor to a creditor to pay him more than the others is void. p. 104.
5. **COMPOSITIONS WITH CREDITORS.—Secret Preferences.—Evidence.—Sufficiency.**—Where the only question involved was whether a note executed by appellee's decedent to the appellant was void as having been executed as a secret preference in effecting a composition with decedent's creditors, appellant's contention that there was no evidence to warrant the trial court's finding that the note was executed as a secret preference can not be sustained, notwithstanding appellant has in its favor the presumption of good faith and the inhibition of the law against the presumption of fraud, where it conclusively appears from the facts disclosed by the note, the composition agreement, and

Citizens National Bank v. Kerney—59 Ind. App. 96.

other papers connected with the transaction, that decedent borrowed a sum from appellant with which to effect the composition; that the note was given to appellant for a part of its claim not included in the composition settlement; that on the day of accepting the settlement under the composition, though subsequent to such acceptance, appellant took decedent's agreement to execute the note in question, etc., and especially in view of the testimony of decedent's sons to the effect that the president of defendant bank would not sign the composition agreement without an understanding that the note would be executed, and to the effect that the execution of a new note in its stead was later demanded of decedent because the note in question was not available. pp. 105, 111.

6. COMPOSITIONS WITH CREDITORS.—*Secret Agreements.—Admissibility of Parol Evidence.*—In an action involving the question of whether a note in question was executed by plaintiff's decedent as a secret preference in effecting a composition with creditors, parol testimony of negotiations had with defendant prior to the execution of the composition agreement showing that the execution of the note was requested by defendant as a condition for its acceptance of the composition settlement, as well as testimony of admissions subsequent to the execution of the note, to the effect that it was a preference, was admissible notwithstanding the written composition agreement had been executed some time prior to the execution of such note. pp. 108, 110.

7. CONTRACTS.—*Written Contracts.—Parol Evidence.—Admissibility.*—Parol evidence can not, as a general rule, be received to vary or contradict the terms of a written contract, or to show that the consideration, if contractual in character, is other than that expressed; but such rule has no application where the contract was procured by fraud or resulted from the mutual mistake of the parties, or where the contract was tainted with fraud in its inception and in the negotiations leading up to its making. p. 109.

From Posey Circuit Court; *Herdie F. Clements*, Judge.

Action commenced by William Kerney against the Citizens National Bank, in which Neal W. Kerney, as administrator of the estate of William Kerney, deceased, was later substituted as plaintiff. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Woodfin D. Robinson, William E. Stilwell and Oscar R. Luhring, for appellant.

Citizens National Bank *v.* Kerney—59 Ind. App. 63.

Philip W. Frey, John D. Welman, George R. DeBruler and G. V. Menzies, for appellee.

HOTTEL, C. J.—The questions involved in this appeal can probably be presented intelligently and with least repetition by first stating the facts which made possible this litigation. For some time prior to September 14, 1906, appellant had been engaged in the banking business in the city of Evansville, and appellee's decedent, William Kerney, then in life, and hereinafter referred to as decedent, had been one of its patrons and customers. On September 1, 1906, and continuously up to September 14, 1906, decedent was indebted to such bank in the sum of \$9,930 for money borrowed therefrom and evidenced by his note or notes. Decedent was at such time indebted to numerous other persons, firms and corporations in various sums for goods and merchandise sold to him by them. On September 14, 1906, decedent was adjudged a bankrupt and the adjudication of such bankruptcy proceedings was referred to the referee in bankruptcy for the referee district in which Evansville in the county of Vanderburgh was and is situated. On October 4, 1906, appellant filed its said claim against such bankrupt for the sum of \$9,930, which claim was on the same day allowed. On October 6, 1906, the bankrupt, pursuant to one of the provision of the act of Congress authorizing and controlling such bankruptcy proceedings, offered in writing to make a composition with all his creditors by paying them fifty cents on the dollar. This offer was accepted by a majority of the creditors, including appellant. This acceptance is dated, "Evansville, Indiana, Oct. 6, 1906," refers to the offer as having been made on October 6, 1906, and is signed by appellant and numerous other persons, firms and corporations. On October 22, 1906, appellant agreed to accept in lieu of the cash payment to which it would have been entitled by such composition, the note of decedent for its fifty per cent, which agreement is as follows:

Citizens National Bank v. Kerney—59 Ind. App. 96.

"In the District Court of the United States for the District of Indiana. In the Matter of William Kerney, Bankrupt. In Bankruptcy. No. 266. To the Honorable Albert B. Anderson, Judge of the District Court of the United States for the District of Indiana: At Evansville, in said District, on the 22d day of October, A. D., 1906, now comes the Citizens National Bank of Evansville, Indiana, and represents the following: That it is a creditor of William Kerney; that its claim has been filed and allowed in the sum of nine thousand nine hundred and thirty dollars (\$9,930.00); that said bankrupt has offered a composition to his creditors at fifty per centum (50) on the dollar, and that said bank now here offers to accept and states that it will accept as and for and in lieu of its fifty per centum (50) in money of nine thousand five hundred and thirty-four and 15/100 dollars (\$9,534.15) of its debt the promissory note of William Kerney for four thousand seven hundred sixty-seven and 08/100 (\$4,767.08), which promissory note shall be as follows: The note of William Kerney, dated October 22, 1906, in the sum of four thousand seven hundred sixty-seven and 08/100 dollars (\$4,767.08), due thirty (30) days after date, payable to the order of the Citizens National Bank of Evansville, Indiana, at The Citizens National Bank of Evansville, Indiana, waiving relief from valuation or appraisement laws, providing for attorney's fees and six per cent. (6) interest per annum from date. And that said note will be accepted by it in lieu of cash. (Signed) The Citizens National Bank of Evansville, Indiana. By W. L. Swormstedt, Cashier."

On this same day appellant took from appellee's decedent another agreement to pay the remaining fifty cents on the dollar of its claim, which agreement is as follows:

"William Kerney, of Evansville, Indiana, agrees with the Citizens National Bank of Evansville, Indiana, that for the amount of money owing to said Citizens National Bank by said William Kerney not paid by the composition in bankruptcy made in October and November, 1906, the said William Kerney will execute to said bank his note, due five (5) years from date without interest; that as collateral security therefor he will cause to be delivered four certain insurance policies, each in the sum of \$2,500.00 on the life of William Kerney, which

said policies are now in the possession of said bank. But the stock of merchandise held by said bank is not to be held as security for this part of William Kerney's debt, but is to be turned over and conveyed to said Kerney when his two notes one for \$4,767.08 and one for \$2,500.00 are paid, or satisfactorily arranged. And said Kerney authorizes said bank to charge off as expense from the account of moneys realized from the sale of his stock of merchandise the premiums on said insurance policies as they fall due. And he further agrees to keep the premiums paid up so long as this debt is unpaid. In witness whereof, the said William Kerney has hereunto set his hand and seal this 22nd day of October 1906. Wm. Kerney."

On the same day appellant also loaned to decedent \$2,250 with which to carry out the composition.

The petition for the confirmation of the composition was also filed October 22, 1906, and in this petition is set out a copy of the note which appellant had agreed to accept in lieu of cash for its fifty per cent of its claim under such agreement of composition. The referee's certificate of the offer of composition was filed November 8, 1906, and the order confirming the composition was entered November 10, 1906. On November 19, 1906, decedent executed to appellant another and third note, a copy of which is as follows:

"\$4,767.08 Evansville, Ind., Nov. 19, 1906.

Five years after date, we or either of us, promise to pay to the order of The Citizens National Bank of Evansville, Indiana, forty-seven hundred sixty-seven and eight hundredths dollars, and attorney's fees, with interest at eight per cent. per annum after maturity and until paid. Negotiable and payable at The Citizens National Bank, of Evansville, Indiana, without any relief whatever from valuation or appraisal laws, for value received. Wm. Kerney."

This note represented the unpaid fifty per cent or balance of appellant's claim against such bankrupt not covered or paid by the composition thereof and was intended as and given in payment of such balance. After his discharge in bankruptcy, decedent paid to appellant the first two of

the three notes last above referred to, leaving unpaid the note due five years from date last above set out. Thereafter decedent continued to do business with appellant and from time to time made deposits in its bank. Appellant's bank is a national bank and on January 15, 1910, and for some days prior thereto was insolvent, and for some days prior to and subsequent to such date it was in charge of and under the control of the comptroller of currency, by and through one James C. Johnson, who was at such time a national bank examiner. During said time appellant owed to persons who had deposited money in its bank a large amount of money, to wit, an amount in excess of \$1,000,000, and appellant had in its possession a large number of promissory notes and other evidences of indebtedness wholly unsecured. Many of the makers of such notes were insolvent and unable to pay or secure them. The amount of such unsecured and worthless notes then so held by appellant was in excess of its capital stock. Among such notes was the decedent's note of date of November 19, 1906, for \$4,767.68, which was on January 15, 1910, still in appellant's possession and unpaid. Decedent after his composition with his creditors in said bankruptcy proceedings continued in business as a retail shoe merchant in Evansville and continued as the customer of appellant's bank and from time to time made deposits therein, and on January 15, 1910, had on deposit in such bank the sum of \$2,659.25, which appellant on said day pursuant to an order of its board of directors, applied as a credit on decedent's last mentioned note. On February 9, 1910, decedent made a written demand on appellant for the amount of his deposit to wit, \$2,659.25, which demand appellant refused. The foregoing are in substance the undisputed facts disclosed by the pleadings and the evidence.

On February 10, 1910, decedent filed in the Vanderburgh Circuit Court his complaint in two paragraphs seeking to recover the amount of his said deposit in appellant's bank.

The first paragraph is the ordinary common count for money had and received, and the second paragraph proceeds on the theory that decedent had deposited with appellant the sum of \$2,659.25 under a written and printed contract, by the terms of which appellant was to repay such sum on demand. At the March term, 1910, of said court, appellant filed an affirmative answer setting up in detail the facts hereinbefore indicated relating to the insolvency of such bank, its operation by the comptroller of the currency and decedent's insolvency and the application of decedent's deposit as payment on said note of date of November 19, 1906, and averments by way of justifying such application of the deposit, on the theory that it was made by appellant's board of directors under the order and direction of the comptroller of the currency in an effort to prevent such bank being placed in the hands of a receiver and its affairs closed as an insolvent, and to save the depositors of such bank such amount as a credit on an unsecured and worthless note. At the same term of court, to wit, on March 20, 1910, decedent filed to said answer a reply in two paragraphs, the first paragraph is a general denial and the second sets out in detail the facts hereinbefore indicated relative to decedent's bankruptcy proceedings and the filing and allowance of appellant's claim therein and the bankrupt's composition with his creditors, with averments showing and charging that the note on which appellant had applied decedent's said deposits as a credit was given as a secret preference to appellant in the matter of, and as part of, decedent's composition with his creditors and was for this reason fraudulent and void.

The cause was later venued to the Posey Circuit Court and on the day of trial to wit, April 23, 1912, the appellant filed a second and third paragraph of answer. The second paragraph was by way of set-off, based on appellant's note on which it had applied decedent's deposit as a credit, such note having in the meantime become due.

On this same day the death of William Kerney (decedent) was suggested and appellee administrator was substituted and he then filed a third paragraph of reply addressed to appellant's third paragraph of answer, such reply setting out substantially the same facts set out in decedent's second paragraph of reply before indicated herein. On the issues thus formed, there was a trial by the court and a general finding for appellee. Appellant filed its motion for new trial which was overruled and judgment was then

1. rendered on the finding. From this judgment, appellant appeals and assigns as error in this court the insufficiency of the complaint, and the ruling on the motion for new trial. The first assigned error is waived because not presented by appellant's brief. *Theobald v. Clapp* (1909), 43 Ind. App. 191, 87 N. E. 100.

While the motion for new trial contains several grounds which are here relied on and urged as grounds for reversal, appellant concedes that the principal question to be determined by the appeal is "the validity of the note executed by Kerney on November 19, 1906." In this connection it says: "If the note is a valid note the appellant insists that the bank had the right to apply the credit at the time it applied it, *at any rate (it) was entitled to a set-off at the time of trial as the note was then due, and that judgment over for the balance due on the note should have been rendered in the bank's favor.*" (Our italics.)

It is apparent that both of these contentions are predicated on the validity of said note. It will be observed from the history of the case set out above, that, after

2. appellant filed its first paragraph of answer, setting up an equitable set-off, the note, on which it had applied decedent's deposit (as alleged in such answer of equitable set-off), matured, and it then filed an answer of statutory set-off based on such note, and asking judgment for any excess due on such note over decedent's claim. It follows that the latter answer, in effect, took the former

out of the case, or at least, so shaped the issues that the disposition of any question affecting such equitable set-off is rendered unimportant to appellant.

This, in effect, eliminates all questions save that of the validity of said note which question, as it comes to us, is one of fact to be determined from the evidence in

3. the case. It is contended by appellee that such note was given as a secret preference over decedent's other creditors in the bankruptcy proceedings to induce appellant to sign decedent's composition with his creditors, and hence is invalid. Appellant on the other hand contends that decedent, after the composition with his creditors had already been made, executed such note voluntarily, and as a recognition of the moral obligation to pay the balance of his indebtedness to appellant. Appellee has in his favor the decision of the trial court, and unless this court can say that such decision on the question involved is without any probative evidence in its support appellant must fail. *Hedrick v. Hedrick* (1911), 48 Ind. App. 658, 660, 94 N. E. 728; *East v. Amburn* (1911), 47 Ind. App. 530, 535, 94 N. E. 895; *Lucas v. Rhodes* (1911), 48 Ind. App. 211, 220, 94

N. E. 914. It is well settled in this State, and indeed,

4. in all other jurisdictions covered by our investigation of the question under consideration, that, where creditors unite in a composition agreement with their common debtor, that "the utmost good faith must be observed by all parties", and that "a secret promise by the debtor to one creditor to pay him more than the others is void." *Carey v. Hess* (1887), 112 Ind. 398, 400, 14 N. E. 235; *Morrison v. Schlesinger* (1894), 10 Ind. App. 665, 667, 38 N. E. 493; *Huntington v. Clark* (1873), 39 Conn. 540, 553; *Atlas Engine Works v. First Nat. Bank* (1912), 50 Ind. App. 549, 553, 97 N. E. 952; *Powers Dry Goods Co. v. Harlin* (1897), 68 Minn. 193, 71 N. W. 16, 64 Am. St. 460; *Hanover Nat. Bank v. Blake* (1894), 142 N. Y. 404, 410, 37 N. E. 519, 40 Am. St. 607, 27 L. R. A. 33; 1 Story, Eq.

Jurisp. (13th ed.) 384, 385; Greenhood, Public Policy 141, 142.

The question here involved therefore requires us to determine whether there is any evidence in this case which can be said to authorize the inference (evidently drawn

5. by the trial court), that the note in controversy was given pursuant to a secret agreement of preference or advantage made between decedent and appellant by way of inducement to appellant's signing said composition agreement. As affecting this question, we have indicated above, in detail, the undisputed entries and documentary evidence connected with appellee's composition with his creditors and it is very earnestly insisted by appellant that from this evidence alone, the question being considered, must be determined, and that such evidence affirmatively shows that the note in suit was given by appellant after such composition, and that, if it can be said to be given pursuant to any agreement, such agreement was in writing, made after appellant's acceptance of the composition, and that the writing affirmatively shows the note was not given as such secret preference to appellant, and could not have been the inducement to sign a composition entered into and signed before the giving of either the note or such agreement.

We can not agree with either of these contentions. We recognize that appellant has in its favor the presumption of the *bona fides* of the transaction, and the inhibition of the law against a presumption of fraud, but we are nevertheless of the opinion that the record and documentary evidence before indicated is of such a character that if, as appellant contends, the decision of the trial court must rest on it alone, this court could not disturb such decision. This evidence shows that appellee's decedent was adjudicated a bankrupt September 14, 1906. Appellant's claim of \$9,930 was filed October 4, 1906. Decedent's offer to make composition with his creditors was filed October 6, 1906. The acceptance of the offer bears the same date of the offer and

refers to the offer as having been made October 6, 1906, and is then signed first by appellant, and then by numerous other creditors from different towns and cities in different states. On October 22, 1906, appellant filed its written offer to accept a note for its part of its claim under the composition agreement, in lieu of cash and on the same day it loaned to decedent \$2,250 additional with which to carry out his composition agreement with the other creditors. On the same day appellant also obtained from decedent the agreement to execute to it the note in controversy; and the decedent filed his petition for the confirmation of the composition with his creditors. The confirmation was finally made by the court on November 10, 1906. The agreement providing for the giving of the note in suit refers to the composition in bankruptcy as "made in October and November, 1906".

It appears conclusively from the foregoing facts that decedent was required to borrow, and that appellant furnished, the money with which decedent effected the composition with his creditors; that appellant did in fact get the note in suit for the part of its claim not included in the composition settlement; that on the same day on which appellant took from decedent his note in lieu of cash as a settlement of its claim under such composition and let decedent have the money necessary to pay his other creditors appellant also took from decedent an agreement by which decedent agreed to give appellant a note for the remainder of its claim. It is but reasonable to suppose that decedent had made some arrangement to get this money to effect such composition with his creditors prior to submitting his proposition of composition. It is significant that appellant's offer to take the note for its part of the composition of its claim in lieu of cash and to furnish to decedent the balance necessary to effect such composition, and the taking of the agreement providing for the execution of the note in suit, and decedent's petition for a confirmation of the

composition, should all occur on the same day. Was it a mere coincidence, that all these things were done on the same day, or were they interdependent acts on which the decedent's consummation of the composition with his creditors depended because of an arrangement which he had with appellant before he made his offer of composition?

The fact that these transactions all occurred on the same day leaves a slender thread to support appellant's contention that because the note and the written agreement pursuant to which it was executed were both executed after appellant's acceptance of the proposition of the composition neither could have been executed as a secret inducement to such acceptance. Said acts were all a part of the same transaction; and if appellant, when it filed its written offer to accept, for the composition of its claim, a note, in lieu of cash, had also filed the agreement made the same day by which it agreed with decedent to give him the note in suit for the remainder of his claim we apprehend that it would not be seriously contended by appellant that such composition would have been consummated. If such agreement had been disclosed it is not likely that either the creditors or the bankruptcy court would have permitted a confirmance of such composition. However, in addition to said undisputed record and documentary evidence, we have also the evidence of decedent's two sons, which is in part as follows: Eugene Kerney testified, in effect, that he was present at a conversation between his father and Capt. Gillett, president of appellant bank, at a time when decedent's offer of composition was pending, and just a few days before it was signed, in which his father said to Capt. Gillett in substance that he "had about got the composition" with his creditors arranged and wanted him (Capt. Gillett) to sign the composition to accept a fifty cent settlement. Gillett replied "we absolutely will not sign a composition unless I get a note or something, because we must be paid one hundred cents for this debt. * * * Capt. Gillett pro-

posed a note for five years without interest * * * My father said he would study it over. * * * We finally agreed * * * when we came back if he would make this note for five years without interest, and if he would sign the composition then we would give him the note because he said he absolutely wouldn't sign the composition unless we did give him a note, we afterwards agreed, we gave him the note and he signed the composition."

Decedent's other son, Neal Kerney, testified to a conversation between decedent and Capt. Gillett in the latter part of February, 1909, as follows: "Well, Capt. Gillett, my father and my brother were talking as I was helping pack up the goods, I heard part of the conversation, and my father said to Capt. Gillett, Captain, you know that note is illegal according to law and can't be collected, and Capt. Gillett said, I know that but I want you to come down to the bank and give me another note because I can't use that note in that shape. My father said, I know you can't use the note and we were both advised the note was illegal." In reply to "father's" last remark Capt. Gillett said "he knew that they were advised".

As affecting the competency of this evidence and its effect on the question being considered, appellant in its brief says:

"The written agreement of Mr. Kerney to give the

6. note in controversy was made October 22, 1906. It had a valid consideration. The composition with creditors had then already been made. It can not now be shown that the consideration for this written agreement was some prior oral agreement. Parol testimony can not be received to vary, contradict, or add to the terms of a written contract, and this rule applies to the consideration expressed in the written contract. * * * The written contract executed October 22, 1906, was a complete contract upon its face and as such the consideration became contractual and can no more be varied by parol than any other portion of the writing * * *. If the written agreement

of October 22, 1906, was a valid agreement and the note was given in pursuance of that agreement, the note was a valid note. If the written agreement of October 22, 1906, was an invalid agreement, Mr. Kerney was not bound to carry it out, and the execution of the note was a voluntary act on his part and was a binding promise to pay the debt.

* * * The testimony of the witness Eugene Kerney to vary and contradict the terms of the written agreements between Mr. Kerney and the bank was improperly admitted."

It is questionable whether appellant has properly saved the question it now attempts to present relating to the admissibility of this evidence, but assuming that it

7. has, without so deciding, we consider the questions above suggested. As a *general rule* parol testimony can not be received to vary or contradict the terms of a written contract and this rule is equally applicable to the consideration expressed in the contract where such consideration is contractual in character. *Wabash R. Co. v. Grate* (1913), 53 Ind. App. 583, 102 N. E. 155, and cases cited; *Pickett v. Green* (1889), 120 Ind. 584, 22 N. E. 737; *Stewart v. Chicago, etc., R. Co.* (1895), 141 Ind. 55, 40 N. E. 67; *Indianapolis Union R. Co. v. Houlihan* (1901), 157 Ind. 494, 505, 60 N. E. 943, 54 L. R. A. 787; *Diven v. Johnson* (1889), 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308; 1 Greenleaf, Evidence §275; 1 Beach, Contracts §32. There are, however, two well-recognized classes of cases to which this general rule has no application, viz., where the contract sought to be varied or contradicted was procured by fraud, or was the result of the mutual mistake of the parties. It is well settled that such rule has no application where the contract sought to be varied or contradicted was tainted with fraud in its inception and in the negotiations leading up to its making. *Moore v. Harmon* (1895), 142 Ind. 555, 559, 41 N. E. 599; *Tyler v. Anderson* (1886), 106 Ind. 185, 191, 6 N. E. 600; *Ewing v. Wilson* (1892), 132 Ind. 223,

226, 31 N. E. 64, 19 L. R. A. 767; *Fenwick v. Ratliff* (1827), 6 T. B. Mon. (Ky.) 154; 2 Jones, Evidence §441. This is necessarily so because a contract begotten in fraud can have no legal existence; but so to say would be mockery, if by its form and words such contract may be made to cover up the illegality or fraud with which it is tainted beyond the possibility of dispute or contradiction by other evidence. As affecting this question, and as peculiarly applicable to the present case, we quote from 2 Jones, Evidence §441: "Since it may always be shown that the document in question never had legal existence, it follows that it may also be shown to be tainted with illegality. For example, no formalities in the writing can stand in the way of proof that the contract is usurious or champertous; or that a lease was for an unlawful purpose; or that the contract was in furtherance of adulterous intercourse, or for compounding a felony, or for suppressing evidence on a criminal prosecution, or for the sale of an office, or for money won at play or for any other contract forbidden by statute or common law. In all such cases the court will go behind the apparently valid written instrument, and deal with the transaction on its merits; and it is immaterial whether the illegality of the instrument is created by the statute, or whether it is immoral, or in some way contravenes the general policy of the law. Under such circumstances the parol agreement cannot be said to be merged in the pretended written agreement, for it is only by virtue of its superior obligation that a written contract has the effect of extinguishing the verbal contract upon which it is founded; and of course when it has no obligation, it can have no such effect."

The foregoing authorities it seems to us dispose of appellant's contention that said evidence was improperly
6. admitted. And, so long as the contract sought to be enforced is tainted with the original fraud no

number of intervening contracts can save it from the condemnation which the law places on it. 9 Cyc. 562, 563, and cases cited; *Shelton v. Marshall* (1856), 16 Tex. 344; *Zoebisch v. Von Minden* (1888), 47 Hun (N. Y.) 213; *Hanover Nat. Bank v. Blake, supra*; *Hall v. Gavitt* (1862), 18 Ind. 390; 6 Am. and Eng. Ency. Law (2d ed.) 395; 15 Am. and Eng. Ency. Law (2d ed.) 996; *Negley v. Linsay* (1870), 67 Pa. St. 217, 227, 228.

We do not mean to be understood as saying that a debtor, who, in a composition with his creditors, gives to one of them a secret preference by which he agrees to pay

5. to such creditor his claim in full, could not afterwards give to such creditor an obligation by which he would be bound to pay the balance of such claim. If both the debtor and creditor recognizing the invalidity of such secret preference cancel or ignore it, and the debtor afterwards voluntarily and purely as a moral obligation, and not pursuant to the illegal agreement, gives a new promise it doubtless should and would be upheld by the courts.

The facts in this case, however, do not necessarily bring it within the case indicated. So that, even though appellant's contention that the record and documentary evidence in the case, standing alone, would necessitate a reversal of the decision of the trial court (a contention with which we can not agree), when we add to such evidence that of decedent's two sons appellant can not seriously contend that there is no evidence to support the decision of the trial court. The judgment is therefore affirmed.

NOTE.—Reported in 108 N. E. 139. As to parol evidence to add to or vary a writing, see 56 Am. St. 659; 17 L. R. A. 270. As to the effect of giving one creditor a secret advantage, see 27 L. R. A. 33. As to the admissibility of parol evidence to show illegality of contract, see 16 Ann. Cas. 388. As to the validity of a note or other security given as secret preference in composition with creditors, see 16 Ann. Cas. 1072. As to the construction of a composition

Board, etc. v. Johnson—59 Ind. App. 112.

agreement with creditors and the effect of fraud thereon, see Ann. Cas. 1914 A 836. See, also, under (1) 3 C. J. 1410; 2 Cyc. 1014; (2) 31 Cyc. 465; (3) 3 Cyc. 360; (4) 8 Cyc. 468; (7) 17 Cyc. 695, 702, 596, 650.

BOARD OF COMMISSIONERS OF THE COUNTY OF DUBOIS v. JOHNSON ET AL.

[No. 8,962. Filed May 26, 1915.]

RAILROADS.—*Township Aid.*—*Expense of Election.*—*Statutes.*—The provisions of §5488 Burns 1914, Acts 1869 (s. s.) p. 92, providing that should an election to vote aid to a railroad result in favor of the railroad appropriation, the expenses of the election, after being paid by the county or township, as the case may be, shall be charged against the railroad company, etc., govern the payment of the expenses incurred in a special township election held to vote aid to an interurban railroad, and, when considered in the light of the original act for voting aid to railroads (Acts 1869 [s. s.] p. 92) and the amendments thereto, require that the expenses of such an election, if not held in the entire county, shall be paid by the particular township or townships in which the election is held. (*Board, etc. v. Center Tp.* [1886], 107 Ind. 584, distinguished.)

From Dubois Circuit Court; *John L. Bretz*, Judge.

Action by Ed C. Johnson and others against the Board of Commissioners of the County of Dubois. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

Richard M. Milburn, Michael A. Sweeney, Joseph W. Yager and George W. Goble, for appellant.

A. L. Gray, for appellees.

IBACH, P. J.—There was an appeal by appellees from the refusal of the board of commissioners to allow their claims as officers of a special railroad election in Patoka Township, Dubois County, to the circuit court, which granted their claims and appellant is appealing from the circuit court judgment. The only error assigned is in the court's conclusion of law on the facts found. The sole question for the court to decide is who is to pay the expenses of a special

railroad election held for the purpose of voting a subsidy by the township to aid in building a railroad through the township, appellant claiming that the township should pay the expenses, appellees that the county must pay.

The special finding of facts shows the filing of a proper petition by more than twenty-five voters of Patoka Township asking that the votes of the legal voters of said township should be taken on the proposition of voting aid to the Vincennes Southeastern Interurban Railway Company to construct a railroad through said township, that the board of commissioners found the petition sufficient, and ordered the special election, proper notice was given, the board of commissioners appointed appellees as inspectors to hold the election, certain expenses were incurred by inspectors as such, which were certified to the board of commissioners and disallowed by it.

In its conclusions of law the court held that the board of commissioners should pay the expenses of the election. Section 5464 Burns 1914, Acts 1889 p. 82, provides for the calling of a special election upon petition of twenty-five freeholders of a township, to decide whether the township shall vote aid to a railroad. The sections following this provide for the manner and method of calling the election. The section of the original act corresponding to §5464, *supra*, permitted the holding of an election in an entire county on petition of one hundred freeholders, and permitted a county to aid a railroad in the same manner as a township. Acts 1869 (s. s.) p. 92, §1. The first section of the original act, and some of the succeeding sections, were amended by subsequent legislatures, taking away from counties the right to give aid to railroads, and limiting that right to townships, and in 1903, the provisions of the act were extended to interurban railroads. Acts 1903 p. 223, §5465 Burns 1914. Section 19 of the original act (§5488 Burns 1914, Acts 1869 [s. s.] p. 92) has never been amended, and is as

follows: "The officers conducting the election provided in this act shall be allowed the same pay as is allowed for like services in case of a general election. Should the election result in favor of a railroad appropriation, the expenses of the election, after being paid by the county or township, as the case may be, shall be charged against the railroad company benefited, and deducted out of the first moneys collected by virtue of the appropriation."

This section governs the payment of the expenses of such elections, and the proper construction of such section when considered with the other sections of the original act and the amended sections, seems to be that the county shall pay for an election held in an entire county for the purpose of voting aid to a railroad, but where an election is held only in a particular township or townships, the expenses shall be paid by such township or townships. To place any other construction on the statute would render it meaningless. We think, therefore, that the court erred in holding that the county should pay for the election involved in the case at bar.

Appellees rely on the case of *Board, etc. v. Center Tp.* (1886), 107 Ind. 584, 8 N. E. 625. That case decided that counties must pay the expense of elections for township officers, for the reason that the statute provides that township elections shall be conducted by the officers of and governed by the provisions of the law with respect to general elections so far as applicable. §4735 R. S. 1881, Acts 1881 (s.s.) p. 482. The court said, "Of course, it would have been competent for the legislature to have provided that the expenses of such election should be borne by the proper township, and paid out of the township funds. But the statute contains no such provision." In the present instance the statute specifically provides for the bearing of the expenses of the railroad election by the township in which the election is held, and therefore, the case does not fall within the decision in the case above cited. See also

Picken v. Miller—59 Ind. App. 115.

as supporting our holding, the cases of *McBride v. Hardin County* (1882), 58 Iowa 219, 12 N. W. 247, and *Turner & Co. v. Woodberry County* (1881), 57 Iowa 440, 10 N. W. 827.

Judgment reversed, with directions to the court to restate its conclusions of law in accordance with this opinion, and render judgment accordingly.

NOTE.—Reported in 108 N. E. 965. As to the purposes for which the power of taxation may be asserted, see 8 Am. St. 506. See, also, 38 Cyc. 640; 11 Cyc. 491.

PICKEN v. MILLER.

[No. 8,585. Filed May 27, 1915.]

1. APPEAL.—*Assignment of Errors.*—*Waiver.*—Errors assigned but not presented by appellant's brief are waived. p. 118.
2. NEGLIGENCE.—*Collisions on Streets.*—*Contributory Negligence.*—*Complaint.*—A complaint for injuries to a motorcyclist who was struck by an automobile at a street crossing, alleging that plaintiff, when fifty feet away, saw the automobile approaching three hundred feet from the crossing, is not objectionable as showing that plaintiff was guilty of contributory negligence, in the absence of anything therein to show that he knew that the automobile was approaching at an excessive speed. p. 118.
3. NEGLIGENCE.—*Collisions on Streets.*—*Last Clear Chance.*—*Complaint.*—A complaint for injuries to a motorcyclist who was struck by an automobile at a street crossing, alleging that though defendant "had ample time and room to drive his automobile to the west and rear of plaintiff, he carelessly and negligently drove the same to the east and right" and carelessly and negligently drove the same over and against plaintiff, and that defendant saw, or by the use of reasonable care could have seen plaintiff and avoided the collision, etc., was sufficient to invoke the application of the doctrine of last clear chance. p. 118.
4. APPEAL.—*Review.*—*Instructions.*—There was no error in instructing on the doctrine of last clear chance where one of the paragraphs of complaint was sufficient to invoke that doctrine, nor in giving an instruction in language which, though formerly disapproved by the Appellate Court, has since been approved by the Supreme Court. p. 119.
5. APPEAL.—*Review.*—*Instructions.*—*Urging Jury to Agree.*—The giving of an instruction urging the jury to agree on a verdict, stating that litigation is expensive and "the State expects you

to do your duty conscientiously and faithfully", that the court has no right and is not attempting to ask any juror to yield his conscientious and settled convictions as to the evidence, "but that if this jury is being detained from a verdict by any one man or two men, then it is a matter for those in the minority * * * to seriously consider whether his or their own judgment might not be mistaken", that all business transactions "are done upon the theory of listening to, and, in proper cases, yielding to, the views of others, if they are sound or reasonably so", and that "in a civil case a jury should approach the solution of the question in that spirit and not the spirit of controversy", etc., and should not "allow any outside considerations or motives to have any weight * * * except to be governed by the evidence as it has been detailed to you, and the instructions as the court has given them to you", and directing the jurors to retire and make an earnest effort to reconcile their views, was reversible error. p. 120.

From Superior Court of Marion County (87,850) ; *Charles J. Orbison*, Judge.

Action by Francis S. Miller against William N. Picken. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Joseph E. Bell and *George Shirts*, for appellant.

Clinton B. Marshall and *W. C. Stover*, for appellee.

HOTTEL, J.—This is an action brought by appellee to recover damages for injuries to himself and to his motorcycle, alleged to have been caused by appellant's negligence.

The complaint is in three paragraphs. The averments of the first paragraph are in substance as follows: On the day of his injury appellee was riding his motorcycle east on Michigan Street, a street fifty feet in width running east and west in the city of Indianapolis, and appellant was driving his automobile north on Meridian Street, a street about the same width running north and south in said city. A collision occurred at the intersection of such streets. When approaching the intersection of said streets and driving carefully and when within fifty feet of the west line of Meridian Street, appellee looked both to the north and

to the south and saw appellant in his automobile approaching from the south and about 300 feet distant. Appellee proceeded to cross Meridian Street slowly and carefully, and when east of the center thereof he saw appellant approaching him at a high, excessive and unlawful rate of speed and in order to avoid a collision with said automobile, swerved his motorcycle to the left and northward. Appellant negligently and carelessly drove his automobile "towards * * * plaintiff at a high and unlawful rate of speed, to wit, thirty miles per hour, and did then and there, when near * * * plaintiff, negligently and carelessly turn the same sharply to the right and eastward and directly towards * * * plaintiff and caused the course of said automobile to be changed from said Meridian into said Michigan Street and to the eastward of said Meridian Street, and did negligently and carelessly drive * * * said automobile with great force and violence upon, against and over * * * plaintiff and his motorcycle, knocking him off," etc.

The second paragraph of complaint is substantially the same as the first with the exception that it proceeds on the theory that appellee was in a position of danger and that appellant in the exercise of ordinary care could have avoided the collision by swerving to one side of appellee's motorcycle. The averments which distinguish it from the first paragraph are in substance as follows: Appellee when crossing Meridian Street in order to get out of the course of appellant and give him ample room to pass to the rear and to the west, veered his motorcycle to the north and rode and drove the same across the center of Meridian Street; that although appellant had ample time and room to drive his automobile to the west and rear of appellee, he carelessly and negligently turned the same to the east and right and drove the same carelessly, negligently and at a high and dangerous rate of speed into said Michigan Street and "did carelessly and negligently drive and propel

the same over, on and against * * * plaintiff and his motorcycle without any fault whatsoever upon the part of * * * plaintiff, hurling him violently to the ground and injuring him. * * * That appellant saw, or by the use of reasonable care could have seen, * * * plaintiff so crossing the intersection of said streets * * * and could have turned his automobile to the left * * * and avoided any collision" with appellee.

The third paragraph seeks to recover damages for the motorcycle.

To each of such paragraphs appellant demurred for want of facts, which demurrers were overruled. The only answer filed was a general denial. There was a trial by a jury, and a general verdict for appellee, together with answers to interrogatories.

A motion for judgment on the answers to interrogatories and for a new trial, filed by appellant, were each overruled and judgment rendered on the verdict. From such judgment appellant appeals and assigns the following errors: (1-3) Error of the court in overruling appellant's separate demurrer to each paragraph of appellee's complaint. (4) Error of the court in overruling appellant's motion for judgment on the answers to interrogatories. (5) Error of the court in overruling appellant's motion for new

1. trial. The first, third and fourth assigned errors are not presented by appellant's brief and are therefore waived.

The second assigned error challenges the ruling on the demurrer to the second paragraph of complaint. It is insisted that this paragraph shows: (1) that appellee

2. was guilty of contributory negligence in attempting to cross the street in front of an automobile which he saw when fifty feet from the street, and which
3. he then knew was going at a high and dangerous rate of speed; (2) that such paragraph is not sufficient under the doctrine of last clear chance. The aver-

ments of this paragraph are not open to the first criticism. While it is true, that they show that appellee when fifty feet away from the crossing saw appellant's automobile approaching 300 feet distant, they do not show that he, at that time, knew that it was approaching at an excessive speed. As to the second objection it is sufficient to say that the general averment of the paragraph, above indicated, to the effect that the appellant carelessly and negligently drove his automobile on and against appellee, was sufficient to invoke the application of the doctrine of last clear chance. *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 496, 77 N. E. 945; *Indianapolis Traction, etc., Co. v. Kidd* (1906), 167 Ind. 402, 410, 79 N. E. 347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942; *Mortimer v. Daub* (1912), 52 Ind. App. 30, 38, 98 N. E. 845, and cases cited; *Cleveland, etc., R. Co. v. Van Laningham* (1913), 52 Ind. App. 156, 167, 97 N. E. 573, and cases cited; *Union Traction Co. v. Bowen* (1915), 57 Ind. App. 661, 103 N. E. 1096; *Southern Ind. R. Co. v. Drennen* (1909), 44 Ind. App. 14, 19, 88 N. E. 724.

It is next insisted that instruction No. 9 given by the trial court on its own motion was erroneous. Several objections are urged against this instruction, the one most

4. strongly insisted on, being to the effect that such instruction is predicated on the "last clear chance doctrine"; that neither paragraph of the complaint is sufficient on such theory, and hence that such instruction is not applicable to the issues. What we have said in our discussion of the sufficiency of the second paragraph of complaint disposes of this contention. The instruction, when read in its entirety, and applied to the second paragraph of the complaint, is not open to any of the objections made against it. Instruction No. 13 is objected to. An instruction in practically the same words was disapproved by this court in the case of *Elgin Dairy Co. v. Shepherd* (1913), 103 N. E. 433, but that case was taken over by the Supreme Court and the decision of this court reversed and

the instruction approved. See *Elgin Dairy Co. v. Shepherd* (1915), 183 Ind. 466, 108 N. E. 234, 109 N. E. 353.

Instruction No. 26 is objected to by appellant and is as follows: "Gentlemen of the jury, you have been out considering this cause for about fifteen hours, and have

5. not been able to agree. Of course, I have no means of knowing how you stand or what your trouble is, but I want to say to you that it is very important that a verdict be secured. Litigation is very expensive to the parties, as well as to the county, and the State expects you to do your duty conscientiously and faithfully. I have no right to ask any juror to yield up his conscientious and settled convictions as to the evidence, and I do not ask you to do that, but if this jury is being detained from a verdict by any one man or any two men, then it is a matter for those in the minority, in view of the fact that the other members of the jury, who are equally as honest, and whose judgment is equally as good, take a different view of the evidence, to seriously consider whether his or their own judgment might not be mistaken. All business transactions are done upon the theory of listening to, and, in proper cases, yielding to, the views of others, if they are sound, or reasonably so. In a civil case, a jury should approach the solution of the question in that spirit and not the spirit of controversy, and not the spirit of any feeling toward another member of the panel, or as to any of the parties, nor should they allow any outside considerations or motives to have any weight with them except to be governed by the evidence as it has been detailed to you, and the instructions, as the court has given them to you. Now gentlemen, you will retire to your jury room and make an earnest effort to see whether you can not reconcile your views." Appellant insists, in effect, that this instruction was an attempt to coerce the minority of the jury into making a verdict, and in effect directed the jury to compromise; that the instruction assumed that the jury was detained by one or two jurors, and in effect told

such jurors to surrender to the majority; that it assumed that a verdict had not been agreed upon because of the views of one or two jurors, and that, in so assuming, the court gave unwarranted prominence to the assumed division of the jury on the questions involved and that in such respect the instruction had the same effect as if the court had first inquired how the jury was divided and then had given the instruction; that the court's reference to the way business matters were settled, and the duty of one or two jurors to "yield" to the views of others and thereby no longer detain the jury was a palpable effort to discredit such minority in the minds of their fellows.

While this instruction may not be open to all of the several objections urged against it by appellant, we are of the opinion that if any one or two of the jurors of the jury which tried this cause had in fact stood alone in favor of a verdict for appellant before the giving of said instruction such jurors probably went back to the jury room, after hearing such instruction, feeling that it had been addressed to them alone, and unless such jurors were above the average man in strength of conviction and tenacity of purpose the inevitable tendency of such instruction would be to bring such jurors to an agreement with their fellow jurors, even against the dictates of their own conscience and better judgment. Such an instruction would undoubtedly give to the ten or eleven jurors an advantage over the one or two which they did not before possess, and in our judgment the advantage would be such that it, in most instances, would make it possible for such majority to influence and control such minority regardless of the convictions and judgment of the individuals constituting such minority. In support of the instruction appellee cites: *Allen v. United States* (1896), 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528; *Bell v. State* (1906), 81 Ark. 16, 98 S. W. 705; *Terry v. State* (1906), 50 Tex. Cr. 438, 97 S. W. 1043; *Commonwealth v. Tuey* (1851), 62 Mass. 1. In

none of these cases will be found all of the objectionable elements found in the instruction under consideration. The court in this instruction lays stress on the expense of litigation to the parties, and the county, and the importance that a verdict should be secured, and it is in this connection suggested that if the jury is being detained from a verdict by any *one or two* men that *such minority should seriously consider whether his or their own judgment might not be mistaken*. Then follows the suggestion that all business transactions are done on the theory of listening to and in proper cases *yielding to the views of others*. With such admonition the jury is told to retire and "make an earnest effort to see whether you can not *reconcile* your views". (Our italics.) After hearing this instruction the jurors could hardly have gone back to their jury room with any other notion than that the court expected them to come to a reconciliation of their views by the one or two jurors yielding to the majority.

In the case of *People v. Sheldon* (1898), 156 N. Y. 268, 282, 50 N. E. 840, 66 Am. St. 564, 41 L. R. A. 644, Chief Justice Parker said: "An attempt to drive the members of a jury into an agreement is beyond the power of the court, and an obvious effort to effect such a result demands a new trial." In the case of *St. Louis, etc., R. Co. v. Bishard* (1906), 147 Fed. 496, 78 C. C. A. 62, the trial court after the jury had been out over night charged it as follows: "I want to say to you, gentlemen of the jury, that this has been a very expensive trial to the litigants. It has consumed three days of the court's time, and that in justice to both parties a verdict should be rendered if possible. The juror who is standing out against the other ten should listen to their arguments and should try and look at the case from their viewpoint. As I charged you and now charge you, you are the exclusive judges of the evidence in this case." Concerning this instruction the court on appeal said: "The charge itself was not sufficiently

guarded. Its tendency was to bring the one juror to an agreement with the others, even against the dictates of his own judgment." In the case of *Clem v. State* (1873), 42 Ind. 420, 437, 13 Am. Rep. 369, the Supreme Court in discussing an instruction which emphasized the duty of a juror to compromise or yield his views to that of his fellow jurors said: "If one juror is to yield his judgment to that of another, there should be some mode of determining which of them may adhere to his judgment, and which must yield." To the same effect, see, *Richardson v. Coleman* (1892), 131 Ind. 210, 29 N. E. 909, 31 Am. St. 429; *United States v. Allis* (1893), 73 Fed. 165; *Burton v. United States* (1905), 196 U. S. 283, 307, 25 Sup. Ct. 243, 49 L. Ed. 482; 2 Thompson, Trials §2303.

We are of the opinion that the trial court committed harmful error in giving the instruction and that on account thereof the motion for new trial should have been sustained. On account of such error, the judgment below is reversed with instructions to the trial court to grant a new trial and for any other proceedings consistent with this opinion.

NOTE.—Reported in 108 N. E. 968. Coercion of disagreeing jury as ground for a new trial is discussed in 10 L. R. A. 643. As to the doctrine of last clear chance in its general phases and as affected by plaintiff's due care or by his negligence, see 55 L. R. A. 418; 7 L. R. A. (N. S.) 132, 152; 17 L. R. A. (N. S.) 707; 19 L. R. A. (N. S.) 446; 27 L. R. A. (N. S.) 379. See, also, under (1) 3 C. J. 1409; 2 Cyc. 1014; 3 Cyc. 388; (2, 3) 28 Cyc. 45; 37 Cyc. 281; (4) 38 Cyc. 1614; 11 Cyc. 747; (5) 38 Cyc. 1858.

FERDINAND RAILROAD COMPANY v. BRETZ.

[No. 8,628. Filed May 27, 1915.]

1. APPEAL.—*Waiver of Error.—Briefs.*—Grounds for a new trial not presented or discussed in appellant's points and authorities are waived. p. 124.
2. NEW TRIAL.—*Grounds.—Appeal.*—That the finding and judgment of the court are not sustained by sufficient evidence, and that the finding and judgment of the court are contrary to law,

Ferdinand R. Co. v. Bretz—59 Ind. App. 123.

are not authorized by the statute as grounds for a new trial, and are insufficient to present any question on appeal. p. 124.

3. APPEAL.—*Burden to Show Error.*—The burden is on appellant to show the commission of harmful error. p. 125.

From Dubois Circuit Court; *O. M. Welborn*, Special Judge.

Action by William H. Bretz against the Ferdinand Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Bomar Traylor, for appellant.

A. L. Gray, for appellee.

FELT, J.—Appellee brought this action against appellant under §5448 Burns 1908, Acts 1885 p. 224, to recover the reasonable value of a fence constructed by him between his land and appellant's right of way. The case was tried by the court without the intervention of a jury, and there was a finding for appellee for \$109.63, on which judgment was duly rendered.

Appellant filed a motion for a new trial based on the following grounds: (1) Error in the assessment of the amount of recovery in that it was too large. (2) That the finding and judgment of the court are not sustained by sufficient evidence. (3) That the finding and judgment of the court are contrary to law. This motion was overruled and the action of the court in so doing is the only error assigned and relied on for reversal.

The first cause for a new trial is not presented or considered in appellant's points and authorities and is therefore waived. *Owen v. Harriott* (1911), 47 Ind. App.

1. 359, 94 N. E. 591; *City of Logansport v. Newby* (1912), 49 Ind. App. 674, 98 N. E. 4; *Indianapolis Traction, etc., Co. v. Gillaspie* (1914), 56 Ind. App. 332, 105 N. E. 242; *Louisville, etc., Traction Co. v. Lloyd*
2. (1915), 58 Ind. App. 39, 105 N. E. 519. The second and third causes assigned for a new trial are not

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

authorized by the statute and are insufficient to present any question. *Bradford v. Wegg* (1914), 56 Ind.

3. App. 39, 102 N. E. 845, and cases cited. The burden is on appellant to show that harmful error was committed against it. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 623, 626, 103 N. E. 652.

No error being presented, the judgment is affirmed.

NOTE.—Reported in 108 N. E. 967. As to admission of irrelevant and immaterial evidence as ground for demanding new trial, see 66 Am. Dec. 717. See, also, under (1) 3 C. J. 1409; 2 Cyc. 1014; 3 Cyc. 388; (2) 3 C. J. 1390; 2 Cyc. 1000; (3) 3 Cyc. 275.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. MACY.

[No. 8,277. Filed January 8, 1915. Rehearing denied April 14, 1915. Transfer denied May 27, 1915.]

1. RAILROADS.—*Crossing Accidents.—Failure to Signal Approach to Crossing.—Liability.—Statutes.*—Under §5431 Burns 1914, §4020 R. S. 1881, it is not essential to the sufficiency of a complaint, to show the liability of a railroad company for injuries in a crossing accident resulting from a failure to sound the whistle or ring the bell as therein provided, that it contain allegations showing that the train approached the crossing from a point eighty rods distant therefrom. p. 132.
2. RAILROADS.—*Crossing Accidents.—Failure to Signal Approach to Crossing.—Complaint.*—A complaint for injuries sustained by being struck by a train at a public crossing, charging negligence in failing to signal the approach of the train by sounding the whistle or ringing the bell as required by §5431 Burns 1914, §4020 R. S. 1881, was not open to the objection that the facts pleaded did not show a duty owing from defendant to the plaintiff, on the theory that the statute applies only to such trains as approach the crossing from a point distant therefrom equal to the distance defined by the statute, where the necessary and only reasonable inference to be drawn from the facts alleged was that defendant's train approached the crossing from a point more than eighty rods distant therefrom. p. 133.
3. PLEADING.—*Construction.*—A pleading should be reasonably construed as a whole. p. 133.

4. RAILROADS.—*Crossing Accidents.—Complaint.—Sufficiency.*—In an action for injuries received in a crossing accident, where the complaint alleged facts showing that plaintiff stopped, looked and listened before attempting to cross, that the train approached the crossing, which was a street crossing, at a speed of fifty miles per hour, that there were obstructions to plaintiff's view, that defendant negligently failed to sound the whistle at a distance of eighty to one hundred rods from the crossing, and failed to ring the bell, or otherwise signal the approach of the train, etc., the averments sufficiently showed a duty owing by defendant to plaintiff to operate its train at a lawful rate of speed and to signal its approach to the crossing as required by law, were sufficient to charge actionable negligence in failing to do so, and did not show that plaintiff was guilty of contributory negligence. pp. 133, 134.
5. RAILROADS.—*Failure to Give Crossing Signals.—Liability.*—A failure to give the signals required by law on the approach of a train to a highway crossing is negligence *per se*, rendering the company liable for injuries proximately resulting therefrom. p. 134.
6. RAILROADS.—*Crossing Signals.—Statutes.—Street Crossings.*—The statutory provisions requiring the giving of signals on the approach of a train to a highway crossing apply also to street crossings within the corporate limits of a town, in the absence of an ordinance providing different regulations. p. 134.
7. RAILROADS.—*Operation.—Duty to Give Crossing Signals.*—Independently of statute or ordinance, it is the duty of a railroad company to give timely warning of the approach of its train to the crossing of a public street. p. 134.
8. RAILROADS.—*Crossing Accidents.—Instructions.*—In an action for injuries sustained in a crossing accident, where negligence was charged in defendant's failure to give warning of the approach of the train to the crossing, and the evidence conclusively showed that plaintiff was a traveler upon the highway and was struck by defendant's train, an instruction stating that "in actions for damages on the ground of negligence alleged" certain things are necessary to recovery, was not erroneous for failure to mention the duty owing by defendant to the plaintiff, especially in view of other instructions defining negligence as applied to the averments of the complaint and informing the jury that before plaintiff could recover he was required to prove the material allegations of his complaint by a fair preponderance of the evidence. p. 135.
9. APPEAL.—*Review.—Instructions.—Incomplete Instructions.*—A party can not predicate error on the giving of an incomplete

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

instruction, in the absence of a showing that a correct and complete instruction on the subject was tendered and refused. p. 135.

10. **APPEAL.—Review.—Harmless Error.—Instructions.**—The giving of an instruction in an action for injuries received at a railroad crossing stating that in actions for damages on the ground of negligence as alleged certain things are essential to recovery, but omitting to mention the duty owing to plaintiff by the defendant, if erroneous because of such omission, was harmless where the undisputed facts were such as to impose on defendant the duty to give warning of the approach of its train to the crossing. p. 136.
11. **APPEAL.—Review.—Instructions.**—The objection that an instruction on the subject of contributory negligence informed the jury that all evidence of contributory negligence must come from the defendant, can not prevail where the closing part of the instruction stated that the burden of proving the defense of contributory negligence was on defendant, but if the evidence in the case, whether produced by the plaintiff or the defendant, or both of them combined, established contributory negligence, it would be available as a defense. p. 136.
12. **RAILROADS.—Crossing Accidents.—Contributory Negligence.—Jury Question.**—Where there is evidence to show that a traveler exercised some care in attempting to cross a railroad track, and that there were obstructions to his view and conditions which rendered hearing difficult, or where there is a controversy in the evidence as to whether any care was used, or as to the *quantum* of care, or where the facts are such as to warrant the drawing of different inferences as to the exercise of care, or want of care, the question of contributory negligence is for the jury. p. 136.
13. **RAILROADS.—Crossing Accidents.—Issues.—Existence of Speed Ordinance.—Right to Rely on Obedience to Ordinance.—Instructions.**—Where the complaint in an action for injuries in a crossing accident alleged that the train approached the crossing at a speed in excess of that provided by an ordinance of the municipality, such complaint and the answer in general denial put in issue the fact that there was such an ordinance, duly enacted and in force, at the time of the injury, and such ordinance was admitted in evidence on what the court deemed sufficient *prima facie* proof of its passage, an instruction that if the jury found that such an ordinance was at the time in force, the plaintiff had a right to presume and rely on the presumption that defendant would not violate it, etc., was not erroneous and was properly within the issues and proof. p. 138.
14. **APPEAL.—Review.—Harmless Error.—Instructions.**—In instructing the jury that if it found that a certain speed ordi-

nance was in force at the time of the injury to plaintiff, who was struck by a train alleged to have been operated at an unlawful speed, the plaintiff had a right to rely on the presumption that the defendant would not violate such ordinance, etc., the error, if any, in failing to tell the jury what was essential to show that the ordinance had been duly passed and was in force, was harmless, where it was admitted that there was no conflict in the evidence on that subject and appellant requested no instruction as to that matter. p. 139.

15. *APPEAL.—Review.—Instructions.*—In an action for injuries to a traveler on a public street who was struck at a railroad crossing, where it was alleged that the train was operated at a speed in excess of that allowed by an ordinance, and in violation of the statute, instructions telling the jury that on due proof of the violation of such ordinance, or of the statute, and that such violation was the proximate cause of plaintiff's injury, he could recover, if free from contributory negligence, and which dealt with the conditions alleged, of which there was proof, and told the jury that plaintiff was at all times bound to use his senses and to exercise care commensurate with the danger and conditions confronting him, were unobjectionable. p. 139.

16. *DAMAGES.—Personal Injuries.—Measure of Damages.—Peril to Life.—Instructions.*—In an action for injuries sustained in a railroad crossing accident, while it was error in an instruction setting out the elements of damages to state that damages might be awarded for the peril to plaintiff's life, if any was shown, etc., was harmless, where the evidence showed that plaintiff had a life expectancy of nine years and had an earning capacity of about \$2,000 per year, that his salary was wholly lost for a period of seven months, and that his health was permanently injured and his earning capacity greatly reduced, and the amount of the verdict, which was for \$2,500, was not questioned in any way. p. 139.

17. *APPEAL.—Excessive Damages.—Waiver of Error in Instructions.*—In order to present any question as to error in the amount of recovery, it must be duly assigned as ground for new trial; hence, where such question is not thus presented, error in an instruction, objected to solely on the ground that it stated an erroneous measure of damages and enhanced the amount of the verdict, is deemed waived. p. 140.

18. *RAILROADS.—Crossing Accidents.—Evidence.—Admissibility of Speed Ordinance.—Sufficiency of Identification.*—In an action for injuries sustained in collision with a train at a street crossing, where it was charged that the train was being operated in excess of the speed allowed by ordinance, the ordinance and the minutes of the proceedings connected with its passage were com-

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

petent under the issues, and sufficiently identified to warrant their admission in evidence, where it appeared that the ordinance was enacted in 1885, that it declared an emergency and stated that it would be in full force and effect from its passage, and the minutes showing its adoption and bearing the signatures of the proper officers, together with the page of the ordinance book where the ordinance was recorded, etc., were identified by the town clerk. pp. 141, 142.

19. MUNICIPAL CORPORATIONS.—*Ordinances.—Proof of Adoption and Contents.*—The authorized record of an ordinance and of the proceedings by which it was enacted afford the best evidence of its enactment and contents, notwithstanding statutory provisions permitting such proof by sworn or duly certified copies. p. 142.
20. MUNICIPAL CORPORATIONS.—*Ordinances.—Validity.—Evidence.*—The duly identified record or ordinance book of a municipality containing the ordinance in question, is *prima facie* evidence of the validity of such ordinance and that all preliminary steps essential to its due enactment and enforcement have been regularly taken. p. 142.
21. MUNICIPAL CORPORATIONS.—*Ordinances.—Continuance in Force.—Presumptions.*—An ordinance duly proven is presumed to continue in force until the contrary is shown. p. 142.
22. PLEADING.—*Non Est Factum.—Verified General Denial.—Issues Presented.—Adoption of City Ordinance.*—A verified general denial performs the office of an answer of *non est factum* in that it puts in issue the execution of the instrument sued on in the broad and comprehensive sense which includes signing, delivery, alteration and anything which goes to show that it is not the instrument of the party sought to be bound, but the filing of a verified general denial to a complaint for personal injuries alleged to have been caused by defendant's violation of a municipal speed ordinance raises no different issue with respect to the ordinance than that which is raised by an ordinary general denial. p. 143.
23. RAILROADS.—*Crossing Accidents.—Evidence.—Contributory Negligence.—Jury Question.*—In an action for injuries to plaintiff while attempting to cross defendant's railroad tracks, where there was evidence to the effect that plaintiff stopped and waited until the east bound train had cleared the crossing; that he looked east and neither saw nor heard an approaching train; that the train going west approached the crossing at about thirty miles per hour without ringing the bell or sounding the whistle; that as the east bound train cleared the track he saw a pedestrian starting to cross the track coming toward him, whereupon he drove his horse onto the crossing, still looking to the east,

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

and just as he entered upon the main track he saw an approaching train; that he instantly endeavored to back off the track, but was unable to do so, etc., the court can not say that the plaintiff was guilty of contributory negligence as a matter of law, and, the question being one of fact for the jury, its verdict finding him free from such negligence was supported by the evidence, though there was evidence warranting a contrary finding. p. 144.

From Jay Circuit Court; *James J. Moran*, Judge.

Action by William W. Macy against The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

G. E. Ross, for appellant.

LaFollette & McGriff and *Macy, Nichols & Bales*, for appellee.

FELT, J.—Appellee brought this action to recover damages for personal injuries received at a railroad crossing through the alleged negligence of appellant. The first paragraph of complaint on which the cause was tried, in substance shows, that on August 4, 1910, appellant owned and operated a line of railroad in and through the town of Ridgeville, Randolph County, Indiana; that the railroad passed through the town in a general direction from south of east to north of west across the streets of the town, including Portland Street; that Portland Street runs north and south through a populous part of the town and people were constantly using said street at the point where appellant's road crossed it; that the town had a population of about 2,000, and was incorporated under the laws of the State; that on and prior to August 4, 1910, there was in said town an ordinance, duly and legally enacted, in full force and effect, regulating the speed of railroad trains within the corporate limits of the town. A copy of the ordinance is set out in the complaint. That by the provisions of said ordinance it was unlawful for appellant to run its trains within the corporate limits of the town at a greater speed than six miles

an hour; that appellant maintained a side track on the north side of its main track and parallel therewith, extending to the west more than one-fourth mile, and to the east about one-fourth mile from said crossing; that there was a dwelling house on the east side of the street immediately north of the side track; that west of the house, extending south, there was a line of shade trees then in full foliage; that the house and shade trees shut off the view to the east, along the railroad, of a traveler on Portland Street, approaching the railroad from the north, so that a view to the east along said railroad could not be obtained until within twenty-five feet of said switch track; that about 9 a. m. on said day a train of freight cars was on the side track and across Portland Street; that there was another locomotive engine west of said crossing about fifty yards; that both engines were making loud noises by escaping steam; that at the time appellee approached said crossing from the north, in a light vehicle, driving a gentle horse, well broken to drive and easily controlled; that he stopped his horse about twenty-five feet from said switch track and looked both ways for approaching trains and listened but neither saw nor heard any train approaching; that after a few minutes the freight train on the switch track was moved to the east and across Portland Street; that appellee deemed this an invitation to cross and drove forward in a careful and prudent manner, and looked both ways and listened for an approaching train until his horse was entering upon the main track, when suddenly, and without warning, appellant negligently and carelessly ran a locomotive and train of cars over its main line of railroad and across Portland Street from east to west at a high and unlawful rate of speed, contrary to the provisions of the ordinance hereinbefore set out, to wit, at the rate of fifty miles per hour, and negligently failed to sound the whistle of the locomotive engine at a distance of eighty to one hundred rods of the crossing, as the same approached the crossing, or to sound

the whistle at all in approaching the crossing, or to ring the bell of the locomotive, and negligently failed to give any alarm as the locomotive and train of cars approached the crossing; that because of the dwelling and shade trees, and because of the engine and cars on the switch track, appellant was unable to see, and because of the noise of the locomotives he was unable to hear, an approaching train from the east; that appellee relied on appellant to operate its trains in a prudent and lawful manner, and not at a speed in excess of that authorized by said ordinance; that when appellee first came to a point in the street where he could see an approaching train from the east, a train was approaching the crossing at a distance of not more than forty feet, and was in such rapid motion that appellee could not cross ahead of it; that he stopped his horse and pulled back on the lines to back his horse off the track, but on account of the great speed at which such train was moving, he was unable to avoid a collision; that the train struck appellee's horse and carriage and threw appellee out and injured him, which injuries are set out in detail; that he was permanently injured; that if the locomotive engine and train of cars had been operated at a lawful rate of speed and the statutory signals had been given, appellee would have seen and heard the locomotive and train of cars as it approached the crossing in time to have avoided being struck. Special damages are also alleged.

A demurrer to the complaint for insufficiency of the facts alleged, was overruled and appellant filed a verified general denial. Upon the issues thus formed a trial by jury was had which resulted in a verdict and judgment in favor of appellee for \$2,500. Appellant's motion for a new trial was overruled.

The errors assigned and relied on for reversal are, the overruling of the demurrer and the motion for a new

1. trial. Appellant contends that the complaint is insufficient in that it fails to show any duty owing from

the appellant to the appellee at the time and under the circumstances complained of; that the facts pleaded

2. in the complaint fail to show that it was the appellant's duty to sound the whistle as required by law; that even though the statute imposes upon those operating trains the duty to sound the whistle and ring the bell at a given place, such statute does not and can not apply to all trains, but only to such trains as approach the crossing from a point distant therefrom, equal to the distance defined by the statute; that plaintiff, in order to state a cause of action under §5431 Burns 1914, §4020 R. S. 1881, must by proper allegations of fact show that the train which it is averred, did not give the signals, but did cause the injury sued for, did approach the crossing from a point eighty rods distant from such crossing. Appellant does not cite any authority to sustain such construction of the statute and we are unable to find any. This precise question was, however, raised by the same appellant in the case of *Pittsburgh, etc., R. Co. v. Terrell* (1912), 177 Ind. 447, 455, 95 N. E. 1109, 42 L. R. A. (N. S.) 367, and decided adversely to appellant's contention. However, in the present case we deem it sufficient to say that the necessary and only reasonable inference to be drawn from the facts averred is that appellant's train approached the public street crossing from a point more than eighty rods distant therefrom.

A pleading should be reasonably construed as a whole. It appears from the averments of the complaint that appellee was traveling on Portland Street and approached

3. appellant's tracks from the north; that he stopped and looked and listened before attempting to cross; that the train from the east approached the crossing

4. at great speed, to wit, fifty miles per hour; that there were some obstructions to appellee's view; that appellant "negligently failed to sound the whistle of said locomotive engine at a distance of eighty to one hundred

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

rods of said crossing, as the same approached said crossing, or to sound the locomotive whistle of said locomotive engine at all in approaching said crossing, or to ring the bell of said locomotive engine as the same approached the said crossing, and * * * negligently failed to give any alarm of said approaching locomotive engine." The duty

to give statutory signals is one fixed by law, and a

5. failure to give such signals is negligence *per se* and renders the railroad company liable for injuries which are the proximate result of such failure, when the person injured is without fault contributing thereto. *Lake Shore, etc., R. Co. v. Myers* (1912), 52 Ind. App. 59, 98 N. E. 654, 100 N. E. 313; *Chicago, etc., R. Co. v. Coon* (1911), 48 Ind. App. 675, 686, 93 N. E. 561, 95 N. E. 596, and cases cited; *Antioch Coal Co. v. Rockey* (1907), 169 Ind. 247, 254, 82 N. E. 76; *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 609, 612, 100 N. E. 675, 102 N. E. 99; *Pittsburgh, etc., R. Co. v. Burton* (1894), 139 Ind. 357, 375, 37 N. E. 150, 38 N. E. 594; *Wabash R. Co. v. McNown* (1913), 53 Ind. App. 116, 99 N. E. 126, 100

N. E. 383. In the absence of an ordinance providing

6. regulations differing from those prescribed by the statute, the statute applies to crossings within the limits of such incorporated town. *Pittsburgh, etc., R. Co. v. Terrell, supra*; *Lake Shore, etc., R. Co. v. Myers, supra*.

Independent of a statute or ordinance, it was the

7. duty of appellant to give reasonable and timely warning of the approach of its train to the crossing of such a public street as that described in the complaint. *Lake Shore, etc., R. Co. v. Myers, supra*; *Pittsburgh, etc., R. Co. v. Terrell, supra*. The averments of the complaint are sufficient to show that appellant owed the duty

4. to appellee of running its train at a lawful rate of speed and of giving warning of its approach to the crossing as required by law, and to charge appellant with actionable negligence in failing so to do, and to warrant

recovery, by appellee, for the injuries proximately resulting therefrom. The averments of the complaint do not show appellee to have been guilty of contributory negligence as a matter of law, and it was, therefore, a question for the jury to determine from the evidence whether he exercised due care to avoid injury in approaching said tracks. *Lake Shore, etc., R. Co. v. Myers, supra*, and cases cited; *Pittsburgh, etc., R. Co. v. Terrell, supra*; *Pittsburgh, etc., R. Co. v. Burton, supra*.

Complaint is made of instruction No. 4 given by the court of its own motion, the specific objection being that it purports to tell the jury the elements necessary

8. to be established in order to entitle appellee to recover and omits the first and most essential element of actionable negligence, viz., a specific duty owing from the appellant to the appellee. The instruction does not specifically mention the duty owing by appellant to appellee, if any, but it begins by stating that, "In actions for damages on the ground of negligence as alleged in the complaint", certain things are necessary to recovery. By other instructions negligence was properly defined and applied to the averments of the complaint, and the jury was informed that before appellee could recover he must prove by a fair preponderance of the evidence, the material allegations of his complaint—that appellant had exceeded the speed limit fixed by the ordinance, or that it had failed to give statutory signals in approaching the crossing, and that appellee's injury was caused by such negligent

9. failure. The instruction was correct as far as it went, and if appellant desired to predicate error on the giving of it, a correct and complete instruction on the subject should have been tendered by it, but this was not done. *Chicago, etc., R. Co. v. Hamerick* (1912), 50 Ind. App. 425, 448, 96 N. E. 649; *Baltimore, etc., R. Co. v. Keiser* (1912), 51 Ind. App. 58, 73, 94 N. E. 330. There was no dispute in the evidence that appellee was a traveler

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

on the public highway and was struck by one of
10. appellant's trains at the crossing. With these facts undisputed, the law fixes the duty appellant owed to appellee of giving warning of the approach of its trains to the highway crossing. Therefore if it should be conceded that the instruction is technically inaccurate, it is plain that appellant was not harmed by giving it to the jury. *Pittsburgh, etc., R. Co. v. Terrell, supra*; *Shirley Hill Coal Co. v. Moore* (1914), 181 Ind. 513, 103 N. E. 802; *Burford v. Dautrich* (1914), 55 Ind. App. 384, 103 N. E. 953.

It is claimed that instruction No. 5 given by the court of its own motion was erroneous in that the jury was told that all evidence of contributory negligence must

11. come from the appellant. The latter part of such instruction reads: "The burden is upon the defendant to establish such defense (contributory negligence) but if the evidence in the case whether produced by the plaintiff or the defendant, or both of them combined, should establish such contributory negligence, it would be available for the defendant as a defense." Again in instruction No. 6, the jury was told: "You have likewise been informed that contributory negligence to be available as a defense must be established by a fair preponderance of all the evidence given in the cause." The instruction complained of is not objectionable for the reasons urged against it and it is clear that the jury was given a correct idea of the law on the subject with which it deals.

Instruction No. 7 states a general definition of negligence that has been approved many times. Appellant contends

that the court erred in the giving of this instruction,
12. "for the reason that the appellee's duties as he approached and attempted to cross appellant's railroad tracks were exactly prescribed as a matter of law and were not fixed by the conduct of a reasonably prudent person, to be determined by the jury as it was left by this instruction to be done." The law is well established with

reference to the duty of a traveler on a public highway when he is about to cross a railroad track which passes over such highway, but where there is evidence tending to show that in attempting to cross the railroad tracks the traveler exercised some care, and that there were obstructions to his view and conditions which rendered hearing difficult, or where there is a controversy in the evidence as to whether any care was used, or as to the *quantum* of care, or where the facts and circumstances proven are of such a character that reasonable minds may draw different inferences as to the care, or want of care, exercised by such person, the question of care, or contributory negligence, is one of fact to be submitted to and determined by the jury, from the evidence, under appropriate instructions by the court as to the law applicable to the question, and the court should not, in such cases, undertake to declare as a matter of law that the traveler so situated and circumstanced, did or did not, discharge the duty imposed on him by the law, of using reasonable and ordinary care to avoid an accident—that is, care commensurate with the danger that might reasonably be anticipated under the particular circumstances shown by the evidence. The rules of law applicable to such cases have been reiterated many times by our courts of last resort, and have been so recently restated by each of such courts that we do not repeat them here. *Virgin v. Lake Erie, etc., R. Co.* (1913), 55 Ind. App. 216, 101 N. E. 500, and cases cited; *Lake Shore, etc., R. Co. v. Myers* (1912), 52 Ind. App. 59, 98 N. E. 654, 100 N. E. 313; *Louisville, etc., Traction Co. v. Lottich* (1915), *post* 426, 106 N. E. 903; *Pittsburgh, etc., R. Co. v. Terrell, supra*, and cases cited. The instruction complained of is correct as a general proposition of law and applicable to the issues of the case at bar.

By instruction No. 8 the court told the jury that if it found "from the evidence that at the time of the controversy in this case, there was in force an ordinance in the

town of Ridgeville" limiting the speed of trains "to 13. six miles per hour, then the plaintiff had the right to presume" and rely on the presumption that appellant would not violate the ordinance, which presumption would continue until appellee learned, or could by the exercise of reasonable care ascertain, that the ordinance was not observed; that notwithstanding such presumption and right of appellee, he was not thereby excused from exercising "such care as the situation rendered reasonable and possible", and was required to diligently use his senses and to exercise reasonable and ordinary care to avoid a collision. Appellant insists that this instruction is erroneous in permitting the jury to determine from the evidence the existence of the ordinance and in permitting appellee, if it found such ordinance to be in force, to rely on a compliance therewith. The complaint and answer put in issue, the fact that there was such ordinance, duly enacted and in force, at the time of the collision charged in the complaint. Such ordinance when duly enacted has the force and effect of law within the bounds of the municipality which enacts it. The court, on what it deemed sufficient *prima facie* proof of the passage of the ordinance, admitted it in evidence, but such admission in evidence did not deprive appellant of the right of showing that the ordinance was invalid, that it had been repealed or amended, or that for some reason it was not in force and binding on appellant at the time of the accident. Under such issues and proof, the instruction was not erroneous or harmful. *Chicago, etc., R. Co. v. Fretz* (1910), 173 Ind. 519, 532, 90 N. E. 76; *Pittsburgh, etc., R. Co. v. Rogers* (1910), 45 Ind. App. 230, 246, 87 N. E. 28; *Baltimore, etc., R. Co. v. Town of Whiting* (1903), 161 Ind. 228, 68 N. E. 266; *Lake Erie, etc., R. Co. v. Brafford* (1896), 15 Ind. App. 655, 666, 44 N. E. 551.

Under the issues in this case, the court should have told the jury what was necessary to be proven to show that the ordinance had been duly passed and that it was in force,

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

but it was for the jury to say, whether such proof
14. had been made, if there was any dispute in the evidence on the subject, or if the evidence relating thereto was such that reasonable minds might draw different inferences therefrom. Appellant requested no instruction on the subject and in its brief states: "There is no conflict in the evidence relative to the alleged ordinance introduced in evidence." In the light of this admission, it is certain that whatever view may be taken of the instruction, appellant was not harmed by leaving the jury to determine from the evidence the existence of the ordinance.

The objections urged to instructions Nos. 9, 10, 11, 12 and 13, are not tenable, and are in effect met by our discussion of other questions and by the authorities cited. These
15. instructions in effect told the jury that on due proof of the violation of said ordinance, or of the statute aforesaid, and that such violation was the proximate cause of appellee's alleged injury, he might recover, provided he was himself free from negligence contributing to his injury. They deal with the conditions alleged, and of which there was some proof, and told the jury that appellee was at all times bound to use his senses and to exercise care commensurate with the dangers and conditions which confronted him. *Virgin v. Lake Erie, etc., R. Co., supra.*

Instruction No. 15 is complained of because in stating the elements for which compensation might be awarded, if the jury found for the plaintiff, it mentions "The
16. peril to his life if any is shown" and for the alleged reason that it authorizes double damages, that is, damages for loss of time and for permanent injury. We do not think the instruction is objectionable for any of the reasons stated, except the one relating to peril of life. *Chicago, etc., R. Co. v. Fretz, supra.* There may be cases where the issues are so framed and the evidence of such a character as to make peril to life an element of damages, but conceding that in this case the element should not have been

included, the question remains, Is it harmful error for which the judgment should be reversed? After setting out the elements that might be taken into consideration, the instruction concludes—"and you should finally award him an amount as in your judgment under the evidence on the subject, as will compensate him for his injuries, not, however, exceeding the amount named in the complaint." The jury awarded appellee \$2,500 damages. There was evidence tending to show that appellee had an expectancy of more than nine years; that he was in good health and earning about \$2,000 per annum in addition to traveling expenses; that his salary was lost altogether for a period of seven months; that his health was permanently impaired and his earning capacity greatly lessened. In appellant's motion for a new trial the amount of the verdict is not questioned in any way and a new trial was not asked on the ground that the damages awarded were excessive.

It has been held that to present any question on appeal as to error in the amount of the recovery it must be duly assigned as a cause for a new trial, and that failure

17. so to do waives any objection to the amount of the verdict. *Davis v. Montgomery* (1890), 123 Ind. 587, 589, 24 N. E. 367; *Hyatt v. Mattingly* (1879), 68 Ind. 271, 276; *Cox v. Bank of Westfield* (1897), 18 Ind. App. 248, 251, 47 N. E. 841; *Ohio, etc., R. Co. v. Judy* (1889), 120 Ind. 397, 398, 22 N. E. 252; *City of Indianapolis v. Woessner* (1913), 54 Ind. App. 552, 103 N. E. 368. In *Peabody-Alwert Coal Co. v. Yandell* (1913), 179 Ind. 222, 229, 100 N. E. 758, the court considered the effect of the erroneous admission of evidence tending only to enhance the damages and said: "Conceding that it was incompetent, it was nevertheless harmless, for it is not contended that the damages assessed were excessive." On principle, it follows that where it has not been assigned as cause for a new trial that the damages are excessive, or in suits on contract, that there is error in the amount of the recovery, being too large, an error in

an instruction, complained of only on the ground that it gave the jury an erroneous measure of damages and enhanced the amount of the verdict, will be deemed waived by the appellant. *Terre Haute, etc., Traction Co. v. Frischman* (1914), 57 Ind. App. 452, 107 N. E. 296; *Houston, etc., R. Co. v. Boozer* (1888), 70 Tex. 530, 8 S. W. 119, 8 Am. St. 615; *Peabody-Alwert Coal Co. v. Yandell, supra*.

The instructions given fairly and fully state the law of the case and no error harmful to appellant is pointed out either in the giving, or in the refusal of instructions tendered.

In appellant's motion for a new trial it assigns as causes, error in admitting in evidence the speed ordinance and the minutes of the meeting of the town board which

18. show the passage of the ordinance. It is asserted that this ordinance was inadmissible because no proof was made of its adoption as required by law; or that it was signed, or published as required by law, or that appellant had notice or knowledge of the ordinance.

The act of 1879 relating to incorporated towns was in force in 1885, when the ordinance in question was passed. It authorized town boards to enact ordinances and put them in force without publication by declaring an emergency. The ordinance offered in evidence declared an emergency and states that it shall be in full force and effect from and after its passage. Acts 1879 p. 201; subd. 6, §3333 R. S. 1881; subd. 6, §4357 Burns 1894. The ordinance record of the town of Ridgeville was identified by the town clerk, the page where the ordinance was recorded and the number of the ordinance were designated, and appellee's exhibit "A" was identified as a true and duly authenticated copy of the ordinance. The minutes of the meeting of the town board of August 13, 1885, when the ordinance was passed, were duly identified by the town clerk together with the signature of the president of the board and that of the

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

secretary who were such officers at the time the ordinance was enacted. The ordinance and the minutes of the town board so identified were admitted in evidence over appellant's objections. It has been held that the author-

19. ized record of an ordinance and of the proceedings by which it was enacted, afford the best evidence of its enactment and contents, and that this rule is not affected or changed by statutes which permit proof thereof by sworn, or duly certified copies. *Green v. City of Indianapolis* (1865), 25 Ind. 490, 492; 8 Ency. Evidence 815 *et seq.*

The ordinance and the minutes of the proceedings
18. were sufficiently identified to authorize their admission in evidence and were competent under the issues of the case. *Pittsburgh, etc., R. Co. v. Rogers, supra*; *Green v. City of Indianapolis, supra*; *Lake Erie, etc., R. Co. v. Brafford, supra*.

Where the authorized record or ordinance book of a municipality containing the ordinance in question, is duly identified, it is *prima facie* evidence of the validity

20. of the ordinance and that all preliminary steps essential to its due enactment and enforcement have been regularly taken. *Lake Erie, etc., R. Co. v. Brafford, supra*; *Pittsburgh, etc., R. Co. v. Rogers, supra*; *Rowland v. City of Greencastle* (1902), 157 Ind. 591, 599, 63 N. E. 474; 2 McQuillin, Mun. Corp. §859; 8 Ency. Evidence 819-823; *Terre Haute, etc., R. Co. v. Voelker* (1889), 129 Ill. 540, 549, 22 N. E. 20; *Barr v. Auburn* (1878), 89 Ill. 361; *Selma St., etc., R. Co. v. Owen* (1901), 132 Ala. 420, 430, 31 South. 598. In the case at bar the ordinance contains an emergency clause, and the minutes offered in evidence show that all members of the town board were present and that

21. the ordinance was duly enacted. An ordinance when duly proven is presumed to continue in force until the contrary is shown. 2 McQuillin, Mun. Corp. §850.

Appellant contends that by virtue of its verified general denial, appellee was compelled to go further and show in

Pittsburgh, etc., R. Co. v. Macy—59 Ind. App. 125.

detail all preliminary steps in the passage and publication of the ordinance, and to show that appellant had knowledge thereof. In this State the plea of *non est factum*, puts in issue the execution of the instrument counted upon in the pleading to which such plea is directed. Literally it means it "Is not (his) deed." In *Evans v. Southern Turnpike Co.* (1862), 18 Ind. 101, the court said: "*Non est factum* was the general issue at common law in actions on bonds, and its office was to put in issue the execution of the deed sued on. It was not necessary that the plea should be verified. In *Indiana*, the term, *non est factum*, is and has been applied to all pleas, answers, and replies that deny the execution of a written instrument constituting the foundation of the previous pleading answered by such denial, but in this State, such pleading, under our statute, has not been regarded as having the effect to put in issue the execution of any written instrument, but only its existence, unless the pleading was verified by oath (Ind. Dig. 651; [*Moorman v. Barton* (1861),] 16 Ind. 206; [*Unthank v. Henry County Turnpike Co.* (1855),] 6 Ind. 125) and hence, where such pleading was not verified, no evidence touching the execution of the instrument was admissible, not being relevant to any issue. This has been held under all the statutes, varying though they have been, somewhat, in their language, because the purpose of them all has been, as has been always understood, to deprive the plea or answer of *non est factum* of the effect of putting in issue the execution of the writing, unless it was sworn to. * * * The defendant ought to know better than anybody else whether he executed the note in suit or not, and if he will not deny it under oath, by a general or special *non est factum*, there is no hardship in holding the execution admitted. The general denial under oath is equivalent in code pleading, to a verified *non est factum*, and puts an issue the execution (including the once existence) of the instrument sued on."

The ordinary general denial puts in issue the existence of the instrument in question, but the *non est factum* goes farther and puts in issue its execution in the broad and comprehensive sense which includes signing, delivery, alteration and anything which goes to show that it is not the deed, contract, or other instrument of the party sought to be bound thereby.

The passage of an ordinance is in the nature of a legislative enactment. The ordinance has no existence until legally enacted and put in force. Where it is alleged that an ordinance had been enacted and was in force at a particular time, the general denial puts those facts in issue and the party alleging them must prove them as alleged or fail upon the issue to which they are material. We therefore conclude that the issue is not different in this case, than it would have been under the ordinary general denial and that the plea of *non est factum* is not an appropriate pleading in cases like the one at bar. §370 Burns 1914, §364 R. S. 1881. The history of the plea and its use in this State, so far as our research has revealed, warrants no such use, and the nature of the issue it is intended to present seems to limit it to cases involving written instruments, such as notes, bonds, deeds, mortgages, contracts and the like. 9 Ency. Evidence 2 *et seq.*; 29 Cyc. 1057; *Patterson v. Churchman* (1890), 122 Ind. 379, 385, 22 N. E. 662, 23 N. E. 1082; *Lamb v. Holmes* (1871), 60 Ill. 497; *Neely v. Chinn* (1846), 8 Blackf. 84; *Godman v. Henby* (1905), 37 Ind. App. 1, 76 N. E. 423; *Harris v. Randolph County Bank* (1901), 157 Ind. 120, 129, 60 N. E. 1025; *Palmer v. Poor* (1889), 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Fudge v. Marquell* (1905), 164 Ind. 447, 453, 72 N. E. 565, 73 N. E. 895.

Appellant earnestly insists that the verdict can not stand because the evidence, without conflict, conclusively
23. establishes the contributory negligence of appellee in attempting to cross appellant's tracks as he is

shown to have done. In presenting this proposition appellant argues at length the rules of law which state the duty of a traveler on a highway when attempting to cross a railroad. Emphasis is laid upon the fact that appellee was familiar with the crossing and that by waiting he could have ascertained his danger in time to have avoided the accident. It is asserted that he could not drive upon the tracks while his view of the main track east of the highway, was obstructed by the east bound train on the south, or switch track, without being guilty of contributory negligence.

There was evidence to the effect that appellee stopped about twenty-five feet south of the switch track and waited until the east bound train cleared the crossing; that he looked to the west and saw the train there had stopped; that he looked to the east, listened and neither saw nor heard an approaching train; that the train going west on the main track approached the crossing at about thirty miles an hour without ringing the bell or sounding a whistle; that as soon as the east bound train cleared the highway appellee saw a lady pedestrian on the highway starting to cross the track from the south to the north, coming toward him; that he then struck his horse and started across the tracks going at the speed of about four or five miles per hour; that he continued to look to the east and just as he crossed the south track and his horse was entering upon the main track, for the first time he saw the approaching train; that he instantly endeavored to stop his horse and back it off the track, but was unable to do so; that the engine struck the horse and vehicle and threw appellee about forty feet and severely injured him.

On such a state of facts the court can not declare as a matter of law, that appellee was guilty of negligence in attempting to cross. There was unquestionably evidence from which the jury might have so found. But considering

Pittsburgh, etc., *R. Co. v. Macy*—59 Ind. App. 125.

appellee's situation, his knowledge of the trains and of the crossing, the obstructions to his view, the fact that he saw a pedestrian whose view to the east was unobstructed starting to cross the tracks, and the evidence tending to show that he looked and listened and used some care to avoid a collision and that the train from the east approached at a high, dangerous and unlawful rate of speed without ringing the bell or sounding a whistle, we hold that the question of appellee's contributory negligence was properly submitted to the jury to be determined from the evidence, and that there is evidence to sustain the verdict. *Lake Shore, etc., R. Co. v. Myers, supra; Chicago, etc., R. Co. v. Hamerick, supra; Chicago, etc., R. Co. v. Fretz, supra; Virgin v. Lake Erie, etc., R. Co., supra; Pittsburgh, etc., R. Co. v. Terrell, supra; Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442, 447, 99 N. E. 1005.

No prejudicial error has been shown. The death of appellee during the pendency of this appeal having been suggested, the judgment is affirmed as of date of submission.

Hottel, C. J., Caldwell, P. J., Ibach, Shea and Powers, JJ., concur.

NOTE.—Reported in 107 N. E. 486. As to the care a railroad company must exercise in running its trains over crossings, see 26 Am. Rep. 207. As to the violation of the rule as to giving of signals as evidence of negligence towards member of the public, see 8 L. R. A. (N. S.) 1063. As to the duty of a railroad to give signals at other than grade crossings, see 3 Ann. Cas. 361; 16 Ann. Cas. 1234. As to the duty of a railroad to give signals at private crossings, see 21 Ann. Cas. 568. As to the admissibility of parol evidence to prove municipal ordinance, see Ann. Cas. 1915 A 709. See, also, under (1, 2) 33 Cyc. 1058, 1057; (3) 31 Cyc. 83; (4) 33 Cyc. 1057, 1060; (5) 33 Cyc. 967; (6) 33 Cyc. 962; (7) 33 Cyc. 958; (8) 33 Cyc. 1129; 38 Cyc. 1778; (9) 38 Cyc. 1693; (10) 38 Cyc. 1635; (11) 29 Cyc. 644; (12) 33 Cyc. 1121, 1111; (13) 33 Cyc. 1027, 1132; 28 Cyc. 394; (14) 38 Cyc. 1637, 1635; (15) 33 Cyc. 1129; (16) 38 Cyc. 1814; (17) 29 Cyc. 745; (18, 19) 28 Cyc. 397; (20) 28 Cyc. 398; (21) 16 Cyc. 1052; (22) 31 Cyc. 195; (23) 33 Cyc. 1111, 1093.

TOWN OF NEWPOINT v. THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 8,490. Filed January 29, 1915. Rehearing denied April 16, 1915. Transfer denied May 27, 1915.]

1. **APPEAL.**—*Review.*—*Briefs.*—*Sufficiency.*—Where appellant's brief shows a substantial and good-faith effort to comply with the rules of the Supreme and Appellate Courts with reference to presenting rulings on demurrers, the questions presented on such rulings will be considered. p. 154.
2. **RAILROADS.**—*Use of Street for Right of Way.*—*Action.*—*Answer.*—*Sufficiency.*—*"Grant"*.—In an action for mandatory injunction to prevent the occupancy and use of a street for railroad purposes, a paragraph of answer on the theory that the right of way over the land occupied by the street had been obtained by defendant's predecessors, long before the town came into existence, pursuant to an act of 1832 (Local Laws 1832 p. 173, §15), and an act of 1848 (Local Laws 1848 p. 432, §14), from the original owners thereof who "gave and granted" to its predecessors the right to take and occupy the ground, etc., was not open to the objection that it failed to aver that such right of way was obtained in writing, since the word "grant" implies a conveyance in writing, and especially in view of the character of the action and the existence of averments justifying the inference that such land was obtained by an instrument in writing. pp. 155, 156.
3. **RAILROADS.**—*Use of Street for Right of Way.*—*Action.*—*Answer of Title.*—*Necessity of Setting Out Deed.*—In an action for mandatory injunction to prevent the use and occupancy of a street for railroad purposes, an answer by the railroad company averring the acquisition of the right of way by grant long before the establishment of the town was not insufficient for failure to set out the deed or grant relied on, since such deed or grant constituted merely the evidence of title and was not required to be pleaded. p. 156.
4. **RAILROADS.**—*Right of Way.*—*Statutory Provisions.*—Under the acts of 1832 and 1848 (Local Laws 1832 p. 173, §15; Local Laws 1848 p. 432, §14), relating to the acquisition of rights of ways by railroad companies, etc., and providing that all contracts, relinquishments, grants, etc., shall be fully and plainly made in writing, and signed by the party making the same, did not have the effect of making all such transactions invalid if not made

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

in writing, but merely rendered them unenforceable in actions at law by the railroad company against the landowner. p. 156.

5. RAILROADS.—*Use of Street for Right of Way.—Action.—Answer.*

—In an action for mandatory injunction to prevent the use and occupancy of a street for railroad purposes, an answer alleging that the land was obtained by defendant's predecessors by grant long before the town was established, etc., was not objectionable on the theory that such grant was unenforceable if not in writing, where it appeared that the grant or gift had been executed. p. 157.

6. RAILROADS.—*Use of Street for Right of Way.—Action.—Answer.*

—*Sufficiency.*—In an action for mandatory injunction to prevent the use and occupancy of a street for railroad purposes, an answer averring facts to show that the original owners of the land occupied by the street had estopped themselves from asserting title against defendant's predecessors, and that any right acquired by plaintiff town in such right of way as a street was subject to defendant's right, was not open to the objection that it was insufficient for failure to show that such right of way was obtained from the original owners in writing. p. 157.

7. RAILROADS.—*Use of Street for Right of Way.—Action.—Adverse Possession.—License.—Answer.*

—The objection, in an action for mandatory injunction to prevent the use and occupancy of a street for railroad purposes that it was not alleged that defendant's right of way was obtained in writing from the landowners, was not applicable to an answer showing the acquisition of a right of way by adverse possession over the land occupied by the street, nor to a paragraph of answer showing that defendant acquired its right of way by license. p. 157.

8. APPEAL.—*Questions Reviewable.—Briefs.*—No question is presented for review on the overruling of a motion for new trial, where appellant's brief wholly fails to meet the requirements of the Supreme and Appellate Court rules in such respect. p. 158.

From Decatur Circuit Court; *John C. Robinson*, Special Judge.

Action by the Town of Newpoint against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

John E. Osborn, Horace C. Skillman and Frank Hamilton, for appellant.

Isaac Carter, H. C. Morrison, Cravens & Cravens, Baker & Richman and Frank L. Littleton, for appellee.

Town of Newpoint *v.* Cleveland, etc., R. Co.—59 Ind. App. 147.

HOTTEL, C. J.—The town of Newpoint, appellant, brought this action and by it sought to compel appellee, by mandatory injunction, to remove one of its main tracks from one of the streets of that town. Briefly stated, the averments of the first paragraph of complaint are in substance as follows: The appellant is a town of about 600 inhabitants, situated in Decatur County, Indiana, and in 1889 was duly incorporated as a municipal corporation, and since that time has been and is now a municipal corporation. Appellee is a railroad corporation and as such owns and operates a line of railroad which passes through the State of Indiana and through the town of Newpoint. There has been a public street, known as Railroad Street, located in such town for more than thirty years. In August, 1906, and previous thereto appellee was threatening to construct a line of railroad longitudinally along said street its entire length. Before appellee had done any work thereon it was notified in writing by appellant's town board not to construct its road on said street and that if it did appellant would institute an action to enjoin the operation of such road. Notwithstanding such notice appellee constructed such railroad upon said street its entire length. Said street is the main street in said town for foot travel and a large number of residences, factories, offices, stores and saloons face upon it on each side its entire length, and the only means of ingress to and egress from such buildings is from and along said street, except by means of alleys and other back entrances. After said track was constructed the town by and through its town board notified appellee not to operate any engines, trains or cars thereon, and notified it that if it did, appellant would institute an action against it to enjoin such operation. Appellee is now daily operating over such track many trains of cars at high and dangerous rates of speed and such operation is without the consent of appellant and its town board. The location of the track in the street and

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

the operation of the trains, engines, and cars thereon, constitute a great menace to the lives of the residents of the town and of the public generally travelling on the street, and impairs the use of the street by the residents of the town and the public generally and will result in loss of life to pedestrians and travelers on the street. Unless enjoined from so doing appellee will continue permanently to maintain the track and to operate cars, engines and trains thereon. Appellant has no adequate remedy at law for the injury complained of. Appellee completed the construction of its track within less than ninety days previous to the commencement of this action and commenced operating engines, trains and cars thereon within less than thirty days prior thereto.

The second paragraph is not materially different from the first, and the third and fourth paragraphs set out more in detail the facts connected with appellee's railroad occupying the street in question, and show that for thirty years last past the appellee had maintained and operated its railroad over such street with the main line thereof extending longitudinally in and along and near the center of said street; that at the west end of such street and south of the main track appellee also maintained a side track; that during such period appellee had at no time occupied more than 25 feet in width of said street, and there remained a considerable portion of said street south of appellee's main track open to the public for travel; that in the years 1906 and 1907, appellee constructed a second main track longitudinally along said street immediately south and adjoining its other main track, etc.

To this complaint there was filed an answer in fourteen paragraphs, the first of which was a general denial. The second, fifth, seventh and eighth paragraphs were afterwards withdrawn. A demurrer to the remaining affirmative paragraphs was overruled as to paragraphs 9, 10, 11, 13 and 14 and sustained as to the other paragraphs.

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

The averments of the ninth paragraph of answer, briefly stated, are in substance as follows: The legislature of Indiana by an act approved February 2, 1832, authorized the "Lawrenceburg and Indianapolis Railroad Company" to construct, build and operate a railroad from Lawrenceburg, Indiana, to Indianapolis, and to acquire the right of way therefor, 80 feet in width; that such legislature also by an act approved February 16, 1848, incorporated, chartered and authorized the Rushville and Lawrenceburg Railroad Company to construct, build and operate a railroad, and to acquire land for that purpose through that part of said county described in appellant's complaint and through what is now the town of Newpoint, and to take and secure the fee of said ground taken for a right of way; that pursuant to such authority the companies so organized and authorized to secure such right of way and construct such railroad, long before 1854 did construct a railroad through that part of Decatur County, Indiana, described in appellant's complaint and through what is now the town of Newpoint; that there was no town where the same is now, and that the portion of the town where it is alleged in the complaint that appellee now has its track or tracks was then forest or agricultural land; "that the owners of such land, now included in said town of Newpoint and the owners of the land over which it is alleged in the complaint the defendant has constructed its road gave and granted to said railroad companies the right to take, occupy and use for such purposes a strip of ground 80 feet wide and which extended through what is now said town; that in pursuance of said gift and grant and long before 1854, said corporation entered upon said strip of ground, graded the same, constructed its railroad thereon and ever since then the same has been occupied and used for the purpose of constructing, operating and maintaining a railroad thereon; that no part of said 80-foot strip, when the same was so acquired and used, was in any public highway or street; that in so con-

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

structing said railroad said corporations expended large sums of money thereon with the full knowledge and consent of the then owners of said land and without objection by any of them; that after all this was done the then owners of the land over which the right of way extended platted the same and marked on the plat the ground occupied by such right of way as 'Railroad Street', and caused the plat to be recorded in the recorder's office of said county; that said railroad companies and their successors, ever since said right of way was obtained as herein alleged have used the part of the land designated as Railroad Street in which it is alleged that appellee has unlawfully placed its track for purposes connected with the business of constructing, owning and operating a railroad thereon, and for the business necessarily incident thereto." The paragraph contains other averments which are not of controlling influence on the question presented by the appeal.

The tenth paragraph contains substantially the same averments as the ninth paragraph, except, instead of alleging that the original owners of the 80-foot strip of land, now claimed by appellant, "*gave and granted*" such land to the said railroad companies, the tenth paragraph proceeds on the theory of estoppel and alleges, "that said corporations entered upon and took possession of the land described in the plaintiff's complaint as the land upon which it is alleged the defendant has constructed its track and tracks and took possession of a strip of ground there 80 feet wide and constructed and operated a railroad thereon and did this long before 1854, and used said strip for right of way purposes; that no part of said right of way was then in any public highway or street; that in so doing they expended large amounts of money; that they did this with the full knowledge and consent of the persons who owned the land over which said right of way extended; * * * that the owners of such land never at any time objected to the construction and operation of the railroad as herein alleged."

Other facts are alleged to the effect that the only attempt at dedication of such strip of ground for street purposes was long after appellant's predecessors in title had acquired their said rights as before indicated, and then only by owners of the land over which said railroad was located filing in the recorder's office a plat of the land included within the present town of Newpoint, on which plat the 80-foot strip on which said railroad was then located was designated as "Railroad Street", and such plat was filed without the knowledge or consent of either of said corporations which had constructed or acquired said right of way for railroad purposes.

The eleventh paragraph contains substantially the same averments as the ninth and tenth paragraphs, but differs from those paragraphs in that it alleges title to the right of way by adverse possession, viz., it alleges "that ever since said 80-foot strip of ground was so taken, said companies so taking it and the companies succeeding them including the defendant, have during all said time used and occupied the same for the purpose of constructing, maintaining and operating a railroad thereon and have used the same for railroad purposes and such occupation and use during all of said time has been continuous, exclusive, adverse, open, notorious and under claim of right to so occupy and use the same, and that this has continued for a period of more than fifty years; and each of said companies has claimed to own said 80-foot strip in fee; that each of said companies or corporations has succeeded to and become the owner of all the rights of the corporations or companies which preceded it in and to said strip of land 80 feet wide."

The thirteenth paragraph purports to be a partial answer only and appellant predicates its title to the strip of ground in question on adverse possession as to all that part of said 80-foot strip extending 1,500 feet east from the west corporation line of the town of Newpoint.

The fourteenth paragraph is substantially the same as

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

the ninth paragraph, except the title to the right of way is alleged to have been acquired by license.

A reply in general denial closed the issues and a trial by the court resulted in a general finding for appellee. Appellant filed a motion for a new trial which was overruled, whereupon judgment was rendered on the finding for appellee.

Separate errors are assigned in this court challenging the respective rulings of the court on the demurrers to each paragraph of answer, and the ruling on the motion for new trial.

It is very earnestly contended by appellee that, on account of its failure to comply with the rules of the court, appellant has wholly failed to present for our considera-

1. tion any question involved in such rulings. Without entering into a discussion of the particular criticisms of the briefs, it is sufficient to say that as to the rulings on the demurrer to each of said answers, appellant's briefs show a good-faith effort to comply with said rules and do, in fact, substantially comply therewith. It follows that appellant is entitled to a consideration of the questions presented by such rulings. *Joseph E. Lay Co. v. Mendenhall* (1913), 54 Ind. App. 342, 102 N. E. 974; *Harmon v. Pohle* (1914), 55 Ind. App. 439, 103 N. E. 1087.

One objection only is urged against each of the paragraphs of answer, viz., that they are bad because it is nowhere alleged in either of them "that appellee's right of way was obtained in writing from the landowners." In support of this contention appellant cites and relies on the acts of February 2, 1832, and February 16, 1848, which are the acts alleged in each of such paragraphs of answer as being the acts of the legislature which authorized appellee's predecessors to construct, build and operate a railroad and acquire the right of way therefor.

The parts of said acts affecting the question under consideration are §15 of the act of 1832 (Local Laws, 1832

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

p. 173), and §14 of an act of 1848 (Local Laws, 1848 p. 432), and as affecting the question under consideration said sections are so nearly identical that we may so treat them. Section 15, *supra*, provides: "It shall be lawful for the corporation, either before or after the location of any section of the road, to obtain from the person or persons through whose land the same may pass, a relinquishment of so much of said land, as may be necessary for the construction and location of the road, as also, the stone, gravel, timber, or other materials that may be obtained on said route, and may contract for stone, gravel, timber, and other materials, that may be obtained from any other land near thereto, and it shall be lawful for said corporation, to receive by donations, gifts, grants or bequests, land, money, labor, property, stone, gravel, wood or other materials, for the benefit of said corporation, and all such contracts, relinquishments, donations, gifts, grants, and bequests, made and entered into in writing, by any person or persons, capable in law to contract, made in consideration of such location, and for the benefit of the corporation, shall be binding and obligatory, and the corporation may have their action at law, in any court of competent jurisdiction, to compel the observance of the same: *Provided*, that all such contracts, relinquishments, donations, gifts, grants, and bequests, shall be fully and plainly made in writing, and signed by the party making the same."

Appellant's objection to the ninth paragraph of answer is not well taken because the averments of this paragraph are such as to, at least, justify, if not necessitate, the

2. inference that such right of way was obtained from the owners by an instrument in writing, and hence, as against said objection, is good. *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99. The theory of this paragraph of answer is that the right of way was obtained pursuant to the acts above indicated and these acts each required the contract of grant

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

to be in writing if the company hoped to enforce it by an action at law. The answer further avers that the owners of the land gave and *granted* to the *railroad companies the right to take, occupy and use, etc.* The word “grant” implies a conveyance in writing. Bouvier’s Law Dict.; 20 Cyc. 1360; 14 Am. and Eng. Ency. Law (2d ed.) 1112; Jones, Evidence (2d ed.) §76. The deed or grant being merely

3. the evidence of title, it was not necessary that it should be set out. *Smith v. Schweigerer* (1891), 129 Ind. 363, 365, 28 N. E. 696; *Barrett v. Johnson* (1891), 2 Ind. App. 25, 27, 27 N. E. 983; *Williams v. Frybarger* (1894), 9 Ind. App. 558, 37 N. E. 202. There are other averments in this answer which, we think, make it

2. sufficient in any event. The character of the action in this case must not be overlooked. It is not an action by appellee to enforce a contract, gift or grant of the right of way obtained by its predecessors from the owners of such right of way; but the action is by the town of Newpoint, which, under the averments of the pleadings, had no corporate existence until more than thirty years after the right of way in question was obtained and the railroad built thereon.

We do not understand that the acts in question had the effect of rendering all contracts, gifts or grants of a right of way not made in writing invalid, but when the

4. consideration for such contract, gift or grant was the location of the road, and the company which procured such contract, gift or grant, desired to enforce it by an action at law against the owner, it could do so under such acts only in case the contract was in writing. Subdivisions 2, 3 and 4 of §5195, and §5236 Burns 1908, §§3903, 3907 R. S. 1881, authorize railroad corporations to secure rights of way by condemnation or by purchase or by voluntary grants or donations, and in no other way; and under these provisions the Supreme Court and this court have held that such a right of way may also be acquired by

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

estoppel, adverse possession or license. *Town of Newcastle v. Lake Erie, etc., R. Co.* (1900), 155 Ind. 18, 26, 57 N. E. 516; *Huffman v. State* (1899), 21 Ind. App. 449, 456, 52 N. E. 713, 69 Am. St. 368; *Louisville, etc., R. Co. v. Berkey* (1894), 136 Ind. 591, 36 N. E. 642; *City of Noblesville v. Lake Erie, etc., R. Co.* (1891), 130 Ind. 1, 29 N.

E. 484. Under the averments of this answer the

5. grant or gift was executed and there remained nothing for the company to enforce. *Schierman v. Beckett* (1882), 88 Ind. 52; *Wills v. Ross* (1881), 77 Ind. 1, 40 Am. Rep. 279.

As before indicated appellee's tenth paragraph of answer contains all the averments necessary to show that the original owners of the right of way in question had by their

6. acts and conduct estopped themselves from asserting title to such right of way against appellee's predecessors, and that any right, if any, afterwards acquired by said town in such right of way as a street was necessarily subject to appellee's right to use for railroad purposes the 80 feet so acquired by it. *Louisville, etc., R. Co. v. Berkey, supra*, and authorities cited; *McClarren v. Jefferson School Tp.* (1907), 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417, 13 Ann. Cas. 978. For these reasons appellant's objection to said paragraph of answer is not tenable.

Paragraphs 11 and 13 contain every averment necessary to show title in appellee by adverse possession, to the 80-foot strip of ground used by it, and hence are not open

7. to said objections urged by appellant against them.

The averments of the fourteenth paragraph of answer are to the effect that appellant acquired its right of way under a license, viz., "that said companies so entered upon said land under a license given them so to do by the then owners of the land; that under and by said license they were given the right to use said strip of ground 80 feet wide and to construct, maintain and operate a railroad thereon and to use the same for all railroad purposes, in-

Town of Newpoint v. Cleveland, etc., R. Co.—59 Ind. App. 147.

cluding the right to lay and use and maintain switches, side tracks, passing tracks, double tracks, etc., and such license and right were given to said companies in consideration that they would construct, maintain and operate on said ground a railroad, and would use said ground for such railroad purposes, and they, under said license, entered upon the same and constructed, maintained and operated said railroad, and for more than fifty years have so used it." These averments make the answer good as against the objection urged against it. *Buchanan v. Logansport, etc., R. Co.* (1880), 71 Ind. 265; *Town of Newcastle v. Lake Erie, etc., R. Co., supra*; *McClarren v. Jefferson School Tp., supra*.

The sixth error assigned challenges the ruling on the motion for new trial. As to this error appellant's brief wholly fails to meet the requirements of the rules

8. of the court. Under appellant's points and authorities we find none of them addressed to this error. After the statement of the record we find nowhere in appellant's brief any statement that the court erred in sustaining the motion for new trial and nothing in the points and authorities directed to any ground of such motion, except to the admission and exclusion of certain evidence, and so far as the briefs show no exceptions were saved to such rulings. It follows that under the repeated decisions of this court and the Supreme Court, that as to such assignment of error no question is presented by appellant's brief. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 103 N. E. 652; *German Fire Ins. Co. v. Zonkers* (1915), 57 Ind. App. 696, 108 N. E. 160; *Chicago, etc., R. Co. v. Wysor Land Co.* (1904), 163 Ind. 288, 294, 69 N. E. 546, and cases cited; *Huber Mfg. Co. v. Blessing* (1912), 51 Ind. App. 89, 99 N. E. 132; *American Fidelity Co. v. Indianapolis, etc., Fuel Co.* (1912), 178 Ind. 133, 98 N. E. 709.

Finding no error in the record the judgment below is affirmed.

Johnson v. Bebout—59 Ind. App. 159.

NOTE.—Reported in 107 N. E. 560. As to the essentials of adverse possession, see 28 Am. St. 158; 88 Am. St. 701. As to the acquisition of title to land within right of way of a railroad by adverse possession, see 2 Ann. Cas. 718; 10 Ann. Cas. 1001. As to the acquisition of title by adverse possession or prescription to land acquired by a railroad for railroad purposes but not within right of way, see 21 Ann. Cas. 163. See, also, under (1) 3 C. J. 1407; 2 Cyc. 1913 Anno. 1013-new; (2) 33 Cyc. 202; 20 Cyc. 1358; (3, 5, 6, 7) 33 Cyc. 202; (4) 33 Cyc. 160; (8) 2 C. J. 1407; 2 Cyc. 1013.

JOHNSON ET AL. v. BEBOUT ET AL.

[No. 8,616. Filed May 28, 1915.]

APPEAL.—*Questions Reviewable.*—*Briefs.*—Where appellants' brief does not disclose what the judgment or decree was, does not contain separately numbered propositions or points and authorities under each heading of error relied on, and, instead of a condensed recital of the evidence, sets out the conclusions of counsel as to what the evidence shows, there has been no proper compliance with the requirements of Rule 22, and nothing is presented for consideration.

From Rush Circuit Court; *John D. Megee*, Judge.

Action by Fred B. Johnson and another against Harter Bebout and another. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

Young & Young, for appellants.

Smith, Cambern & Smith, for appellees.

CALDWELL, J.—Appellees take the position that appellants' brief fails so materially to comply with the rules of this court that no question is presented for our consideration. An examination of the brief reveals that appellees are correct in such contention. The brief is materially defective in the following particulars: (1) It does not disclose what the judgment or the decree below was, as required by the third clause of Rule 22, or that a judgment or decree was rendered. (2) The brief does not contain "under a separate heading of each error relied on, separately num-

bered propositions or points, stated concisely and without argument or elaboration, together with the authorities relied on in support of them", as required by the fifth clause of said rule. The only substitute offered for such requirement of the rule is that under the heading "Substance of the Complaint" and immediately following a statement of the complaint, there are set out certain unnumbered abstract legal propositions intermingled with conclusions deduced presumably from the evidence. (3) The questions attempted to be presented depend entirely on the evidence. The brief does not contain "a condensed recital of the evidence in narrative form" as required by said fifth clause of Rule 22. Under the head "Argument of the Evidence", the conclusions of counsel respecting the evidence in certain particulars are stated. The form adopted is to the effect that the evidence shows this fact and that fact to exist. The substance of the testimony of the witnesses or of any witness, or any document introduced in evidence or the substance thereof is not set out. Under such circumstances the authorities are multiple that nothing is presented for our consideration. See the following: *Cleveland, etc., R. Co. v. Hayes* (1914), 181 Ind. 87, 107, 102 N. E. 34, 103 N. E. 839; *Ireland v. Huffman* (1909), 172 Ind. 278, 88 N. E. 508; *Decker v. Yohe* (1913), 179 Ind. 243, 100 N. E. 756; *Cleveland, etc., R. Co. v. Bowen* (1913), 179 Ind. 142, 100 N. E. 465; *Welch v. State, ex rel.* (1905), 164 Ind. 104, 72 N. E. 1043; *Zink v. Zink* (1914), 56 Ind. App. 677, 106 N. E. 381.

Judgment affirmed

NOTE.—Reported in 108 N. E. 967. See, also 3 C. J. 1408; 2 Cyc. 1013.

CHICAGO. SOUTH BEND AND NORTHERN INDIANA RAILWAY COMPANY v. ROTH.

[No. 8,459. Filed February 10, 1915. Rehearing denied
May 28, 1915.]

1. **PLEADING.—General Allegations.—Averment of Specific Facts.**—Specific facts do not control the general averments of a pleading unless they are contradictory to or inconsistent with such general allegations. p. 164.
2. **RAILROADS.—Crossing Accidents.—Specific Acts of Negligence.—Complaint.—Sufficiency.**—In a complaint for injuries caused by being struck at a street crossing by a hand car operated over defendant's street car track, the general allegation that defendant negligently and carelessly ran and operated said hand car, was not controlled or eliminated by further allegations that defendant negligently and carelessly failed to equip said hand car with an efficient brake, negligently failed to signal its approach to the crossing, and negligently failed to equip it with any device for signalling its approach to the crossing, but the latter were simply additional charges which in no way contradicted or nullified the general charge of negligent operation. p. 164.
3. **RAILROADS.—Crossing Accidents.—Contributory Negligence.—Answers to Interrogatories.**—In an action for injuries sustained at a street crossing by the rider of a bicycle, who was struck by a hand car operated on defendant's street car track, where the complaint, in addition to averments of specific acts of negligence, averred generally that defendant was negligent in the operation of the hand car, answers by the jury to interrogatories showing that plaintiff, approaching from the west, looked both north and south and saw no car approaching; that he rode between two vehicles which obstructed his view just before he reached the tracks; that the car approached from the south on the west track instead of the east track, which was the track customarily used for north bound cars; that after passing the vehicles plaintiff saw the car for the first time, and he was then on the west track; that the car approached at a dangerous rate of speed and no effort was made to slacken its speed, and that plaintiff used ordinary care, etc.; do not show that plaintiff was guilty of contributory negligence, and they sustain rather than contradict the general verdict for plaintiff. p. 164.
4. **RAILROADS.—Street Railroads.—Care in Approaching Crossing.**—The rules applicable to a person crossing over the track of a

Chicago, etc., *R. Co. v. Roth*—59 Ind. App. 161.

steam railway do not apply in all their strictness to persons crossing the tracks of a street railway in a city. p. 165.

5. *APPEAL.—Review.—Evidence.—Measure of Damages.—Instructions.*—In an action for damages sustained in being struck by a car at a street crossing, where the evidence showed that plaintiff was injured and taken to a hospital and had expended the sum of forty dollars for hospital expenses, the evidence was within the issues and warranted the giving of an instruction advising the jury that it could “take into consideration expenses, if any, actually incurred as a result of his injuries”; and even were the instruction erroneous its giving was harmless in view of other instructions telling the jury that its finding must be based on the evidence, and in view of the fact that there is no room for presuming that the jury allowed anything on that feature of the damages other than the amount proven. p. 166.
6. *DAMAGES.—Personal Injuries.—Excessive Damages.*—Where the evidence in a personal injury case showed that plaintiff, who was sixty-eight years of age, was a man of business capacity, strong and active prior to the injury, and that the injury had affected his nervous system and was permanent in character, an allowance of damages in the sum of \$5,000 was not so great as to warrant the setting aside of the verdict on the ground of excessive damages. p. 168.
7. *APPEAL.—Review.—Record.*—The court on appeal does not search the record for causes on which to base a reversal. p. 168.
8. *APPEAL.—Petition for Rehearing.—Briefs.*—On a petition for rehearing appellant may not present points not presented in its original brief, and is not entitled to have its statement of the evidence modified or enlarged to present a point not made in its original brief or mentioned in its reply brief. p. 168.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by John Roth against the Chicago, South Bend and Northern Indiana Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Harry R. Wair and *Henry A. Steis*, for appellant.

Charles P. Drummond and *Donald P. Drummond*, for appellee.

FELT, J.—This is an appeal from a judgment in favor of appellee for damages for personal injuries. With its general verdict the jury returned answers to interrogatories. Errors assigned and relied on for reversal are: (1) The

complaint does not state facts sufficient to constitute a cause of action. (2) Overruling appellant's motion for judgment on the answers to the interrogatories. (3) Overruling the motion for a new trial. (4) Overruling appellant's motion in arrest of judgment.

Omitting averments about which there is no controversy, the complaint, in substance, charges that appellant is, and was on June 4, 1910, a street railway corporation, and owned and operated a road over and upon Michigan Street in the city of South Bend, Indiana, which extended across Jefferson Boulevard in the business section of the city; that on said day appellee was riding eastwardly along Jefferson Boulevard on a bicycle and at the intersection of said streets, when crossing Michigan Street, was struck by a hand car of appellant operated over and upon said street by appellant's servants; that appellant "at said time and place negligently and carelessly ran and operated said hand car" and "further negligently and carelessly failed to equip said hand car with an efficient brake by which said car could be quickly stopped", and further "negligently and carelessly failed to give any signal or warning of its approach to said crossing" and further "negligently failed to equip its said hand car with any device or means by which a signal or warning of its approach to said crossing could be given.

* * * That by reason of each of said acts of negligence
* * * said hand car was * * * run by the defendant upon and against the plaintiff and he was thereby thrown to the ground and dragged. * * * and permanently injured, and he was rendered incapable of following his usual occupation and has lost valuable time and expended money for medical services all to his injury and damages in the sum of \$10,000."

The gist of the objections urged against the complaint is that the specific acts of negligence control and eliminate the general allegation of negligent operation; that the averments do not show that the injury complained of was due

to any act of negligence charged in the complaint.

1. Specific facts do not control general averments unless they contradict, or are inconsistent with, the general averments. *Evansville, etc., R. Co. v. Hoffman* (1914), 56 Ind. App. 530, 105 N. E. 788; *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 405, 97 N. E. 822. The general averment of negligent operation is not controlled or

2. eliminated by the specific charges of failure to properly equip the car, nor does the charge of failure to give warning of the approach of the hand car to the crossing, limit the proof that may be properly offered under the general charge of negligent operation, to proof of failure to give warning of the approach of the car, for such specific allegation is neither contradictory of, nor inconsistent with, the general allegation of negligent operation. *Evansville, etc., R. Co. v. Hoffman, supra*, and cases cited. The allegations following the general charge of negligent operation are simply additional charges of negligence which in no way contradict or nullify the general charge of negligent operation. The complaint was sufficient to withstand a demurrer for insufficiency of facts and is clearly good as against the attack after verdict made in this court for the first time. *Evansville, etc., R. Co. v. Krapf* (1896), 143 Ind. 647, 655, 36 N. E. 901; *Dieckman v. Louisville, etc., Traction Co.* (1910), 46 Ind. App. 11, 19, 89 N. E. 909, 91 N. E. 179; *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 495, 496, 77 N. E. 945.

Appellant contends that the answers to the interrogatories show conclusively that appellee was guilty of contributory negligence. They show among other things that there

3. was a double track on Michigan Street and that it was an established custom of appellant to run its south bound cars on the west track and its north bound cars on the east track and that appellee knew such was the custom; that appellee approached Michigan Street from the west going east; that he looked both north and south for an

approaching car before he attempted to cross, and saw none; that he rode between two vehicles which were passing along the side of the track and obstructed his view of the track just before he reached the car tracks; that the hand car approached from the south on the west track and his bicycle was from four to five feet from the west rail when he could see south on Michigan Street and obtain a view of the approaching hand car; that the hand car moved north about twenty-three feet after the men on the car saw appellee; that appellee after he passed the vehicle looked south and saw the hand car for the first time; that the front wheel of his bicycle was on the west car rail when he first heard the approaching car; that the hand car struck appellee and knocked and dragged him about sixteen feet; that appellant's employes on said car made no effort to slacken the speed of the car before it reached the crossing where appellee was struck; that appellant and its servants knew that many people continually crossed over said crossing and that it was so used on said day; that said car approached the crossing at a rate of speed which was dangerous to persons using the same; that appellee in approaching the crossing used that degree of care that a person of ordinary prudence and caution would use under similar circumstances. The answers are not in irreconcilable conflict with the general verdict, but many of them strongly support it. The motion for judgment thereon was properly overruled.

In presenting alleged error arising on the overruling of the motion for a new trial, appellant suggests numerous questions relating to the giving and refusal of instruc-

4. tions. The construction we have placed on the complaint answers most of the objections urged and shows them to be untenable. Other alleged errors are due to a failure to observe the fact that the rules applicable to a person crossing over the track of a steam railway do not apply in all their strictness to persons crossing the tracks of street cars propelled by electricity in a city. *Duetz v. Louisville,*

etc., *Traction Co.* (1911), 46 Ind. App. 692, 694, 91 N. E. 922; *Henry v. Epstein* (1912), 50 Ind. App. 660, 668, 95 N. E. 275; *Indianapolis St. R. Co. v. Marschke*, *supra*.

The question most strongly urged for the reversal of the judgment arises from the giving of instruction No. 8, requested by appellee, on the measure of damages.

5. The objection urged is that it authorizes the jury to "take into consideration expenses, if any, actually incurred as a result of his injuries". That there is evidence tending to prove that he incurred medical expenses, but no evidence to show the values of the services rendered. The cases dealing with this question bear strong evidence of a want of uniformity in the decisions. Whether a careful analysis of the issues and evidence in each case and the varying phraseology of the several instructions considered would result in clearing up the apparent inconsistency in the holdings, we need not, and do not decide, for in our view of the case under consideration, the differences, if any, in the decided cases, are not material to the question here presented. *Thomas Madden, Son & Co. v. Wilcox* (1910), 174 Ind. 657, 668, 669, 91 N. E. 933, and cases cited; *Ohio, etc., R. Co. v. Stein* (1894), 140 Ind. 61, 69, 39 N. E. 246; *Lytton v. Baird* (1884), 95 Ind. 349, 357; *Indianapolis, etc., Traction Co. v. Henderson* (1906), 39 Ind. App. 324, 330, 79 N. E. 539; *Cleveland, etc., R. Co. v. Case* (1910), 174 Ind. 369, 377, 91 N. E. 238, and cases cited; *Cincinnati, etc., R. Co. v. Armuth* (1913), 180 Ind. 673, 103 N. E. 738, and cases cited.

An examination of the cases where similar instructions relating to damages were held erroneous and harmful shows that in some instances the decisions are based on the proposition that the jury was permitted or directed to go outside the issues and beyond the evidence, while in others the vice is found in permitting the jury to consider loss of time or medical expenses and the like, where there was evidence to show loss of time or expenses but no evidence to show the amount of the expenses or the value of the time lost. Some

instructions which did not expressly limit the jury to the evidence, have been held harmless, as in *Thomas Madden, Son & Co. v. Wilcox*, *supra*, but in some of the cases, including the recent case of *Cincinnati, etc., R. Co. v. Armuth*, the instructions were held harmful on the theory that there was evidence tending to show that expenses were incurred, but total absence of evidence to show the amount thereof or value of the services rendered. In the case at bar it is not contended that the issues would not warrant proof of medical expenses, though it is asserted that the proof made was outside the issues. The evidence shows that appellee was taken to the hospital immediately after the injury and remained there for more than two weeks; that when he left he went immediately to Michigan and was not treated by his physician for injuries received after he left the hospital; that he paid the hospital forty dollars for treatment and care while there. This was legitimate proof of pay for treatment and was within the issues.

Giving the rule contended for by appellant its full effect we do not think the instruction was erroneous or harmful as applied to the facts of the case, for there was proof of payment for care and treatment during the only time the evidence shows he was under treatment for the injuries received. The jury was not left to speculate or guess at the amount and there is no room to indulge the presumption that in making up its verdict it allowed anything for treatment other than the amount definitely proven. Furthermore, at the request of appellant, the jury was further instructed on the measure of damages, and in instruction No. 17 was told, "If you find for the plaintiff, then you will determine from the evidence, the amount the plaintiff is entitled to recover." In other instructions the jury was frequently told that its finding must be based on the evidence. It is clear that there is no room for the contention that the jurors were led to believe that they could go outside the evidence in assessing appellee's damages.

Chicago, etc., R. Co. v. Roth—59 Ind. App. 161.

The jury awarded appellee \$5,000 damages which may be a very liberal allowance, but the amount is not so great as to warrant the court in holding that the jury acted

6. from prejudice, passion, partiality or corruption.

Cleveland, etc., R. Co. v. Jones (1912), 51 Ind. App. 245, 251, 99 N. E. 503; *Cleveland, etc., R. Co. v. Hadley* (1908), 170 Ind. 204, 215, 82 N. E. 1025, 84 N. E. 14, 16 L. R. A. (N. S.) 527. No particular reason is stated by appellant why the judgment is excessive but in argument it is said appellee was 68 years of age with an expectancy of over 10 years. There was evidence tending to show that he was a man of business capacity, strong and active prior to the collision and that his injuries had affected his nervous system and were permanent in character. There was evidence tending to support the verdict.

We have gone through the briefs and considered the numerous questions suggested but we do not feel justified in giving further detailed consideration to them. We find no reversible error. Judgment affirmed.

ON PETITION FOR REHEARING.

FELT, J.—Appellant now contends that the statement in the original opinion that there was no evidence of treatment of appellee by his physicians after he left the hospital, is unwarranted. It sets out in its brief on petition for rehearing certain items of evidence it alleges are in the record, to support its position. The statement in the opinion was made after a careful examination of the digest of the evidence given in appellant's original brief and a reexamination of that brief shows that the statement made was fully

7. warranted. This court does not search the record to reverse a judgment of the lower court.

Appellant may not on petition for rehearing raise new points not presented in its original brief, nor is it en-

8. titled to have its statement of the evidence modified or enlarged to present a point not made in its original

 Smith v. Smith—59 Ind. App. 169.

brief nor mentioned in reply brief. There must of necessity be a limitation to the presentation of new matter if appeals are to be finally determined in any reasonable time. *City of Evansville v. Senhenn* (1898), 151 Ind. 42, 63, 47 N. E. 634, 51 N. E. 88, 68 Am. St. 218, 41 L. R. A. 728; *Chicago, etc., R. Co. v. Coon* (1911), 48 Ind. App. 675, 690, 93 N. E. 561, 95 N. E. 596; *Armstrong v. Hufty* (1901), 156 Ind. 606, 630, 55 N. E. 443, 60 N. E. 1080. Rule 22, clause 5, and Rule 23 of Supreme and Appellate Courts.

Petition for rehearing overruled.

NOTE.—Reported in 107 N. E. 689; 108 N. E. 971. As to what is an excessive verdict in an action for personal injuries not resulting in death, see 16 Ann. Cas. 8; Ann. Cas. 1913 A 1361. As to the duty of a pedestrian to stop, look, and listen before crossing street railway tracks, see 3 Ann. Cas. 334. As to the difference in the degree of care required of a person crossing electric or street railway tracks in a city and in country districts, see 10 Ann. Cas. 336. See, also, under (1) 31 Cyc. 85; (2) 36 Cyc. 1571; 31 Cyc. 85; (3) 36 Cyc. 1646; (4) 36 Cyc. 1533; (5) 36 Cyc. 1638; 38 Cyc. 1782, 1814; (6) 13 Cyc. 130; (7) 3 C. J. 1409; 2 Cyc. 1014; (8) 3 Cyc. 214.

SMITH ET AL. v. SMITH.

[No. 8,625. Filed June 1, 1915.]

1. **APPEAL.—Briefs.—Sufficiency.**—Although appellants' brief may be subject to criticism, it will be treated as sufficient where a good-faith effort to comply with the rules is shown and there is such substantial compliance therewith as to enable the court to ascertain therefrom the error assigned and relied on for reversal and the proposition on which the error is based. p. 171.
2. **WILLS.—Construction.—Devise of Life Estate.—Vesting of Remainder.**—Under a will devising certain real estate to testator's daughter for life and providing that "at her death the same is to descend and vest share and share alike in equal proportions to her children living at the time of her death", and making similar devises to testator's other children, and providing that "if at the time of the death of either of my children * * * such child of mine shall not have a child then living the land herein devised to such child of mine shall in that case vest in equal proportions share and share alike in the grandchildren of

such child of mine as may die without living children and in such case if there is no grandchildren of such child of mine as may die without living children the tracts of land herein devised to such child of mine shall by my executor be sold", and providing that the proceeds of such sale be divided equally among testator's grandchildren, etc., the estate in remainder in the land devised to such daughter vested in her children upon testator's death, so that on the death of one of her children subsequent to the death of testator the interest of such child descended to his legal heirs. pp. 171, 174.

3. *WILLS.—Construction.—Intent of Testator.*—Where the language of a will is plain, there is no room for construction and the courts will give effect to the testator's intention as therein expressed, if such intention is not contrary to law. p. 173.
4. *WILLS.—Construction.*—In the absence of a clear expression of an intention to the contrary it will be presumed that words used in a will were used in the light of the settled meaning which the law attaches thereto. p. 173.
5. *WILLS.—Construction.—Vesting of Estates.—Words of Survivorship.*—The law favors the vesting of estates at the earliest possible moment, so that words of survivorship in a will are construed as referring to the death of the testator, in the absence of language clearly showing that they refer to a subsequent date or event. p. 173.
6. *WILLS.—Construction.—Words of Postponement.*—It will be presumed that words postponing an estate relate to the beginning of the enjoyment of the remainder, unless the language clearly shows that they were intended to relate to the vesting of the estate. p. 174.

From Kosciusko Circuit Court; *Francis E. Bowser*, Judge.

Action by Earl J. E. Smith against Edward H. Smith and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

L. R. Stookey, Wayne Anglin, Wm. F. McNagny, Robert R. McNagny and Philip M. McNagny, for appellants.

John D. Wideman, Allan S. Wideman and L. W. Royse, for appellee.

FELT, J.—This suit was brought by appellee to partition certain real estate and quiet his title thereto. On request, the court made a special finding of facts and stated its conclusions of law thereon, which were in favor of appellee.

Appellant's motion for a new trial was overruled, judgment was rendered on the conclusions of law, and this appeal was taken.

Appellee contends that appellant has not complied with the rules of this court in briefing the case and that no question affecting the merits of the appeal is duly pre-

1. sented. The briefs are justly subject to some criticism, but evidence a good-faith effort to comply with the rules and show such substantial compliance therewith as to enable us to ascertain therefrom that the error assigned and relied on for reversal, is the conclusion of law that appellee owns the one-fourth part of the real estate for which partition was asked.

The briefs of appellants and appellee show that the question of title depends upon the construction given to

2. certain provisions of the will of Edward Thomas, deceased, which are in substance as follows:

“Item second: I give to my daughter Jane Smith * * * the following lands (describing them). * * * Item seven: The land herein devised to Jane Smith is for her natural life only and at her death the same is to descend and vest share and share alike in equal proportions to her children living at the time of her death, the land herein devised to Andrew J. Thomas is for his natural life only and at his death the same is to go to and vest share and share alike in equal proportions to his children living at the time of his death. The land herein devised to Samuel Thomas is for his natural life only and at his death is to go to his children living at the time of his death share and share alike. The land herein devised to Minerva Thomas, now Shafer, is for her natural life only and at her death is to go to her children living at the time of her death share and share alike.

If at the time of the death of either of my children, to wit, Jane Smith, Andrew J. Thomas, Samuel Thomas, Minerva Thomas, now Shafer, such child of mine shall not have a child then living the land herein devised to such child of mine shall in that case vest in equal proportions share and share alike in the grandchildren of such child of mine as may die without living children

and in such case if there is no grandchildren of such child of mine as may die without living children the tracts of land herein devised to such child of mine shall by my executor be sold and the proceeds, after paying expenses, divided equally share and share alike among my grandchildren. Item Eight: All the property of which I may die the owner not otherwise disposed of by the provisions of this will heretofore made I give to my children named in this will, share and share alike, and at the time of my death if any of my said children shall be dead then the children of such dead children shall take the part which such child of mine would have taken if living."

At the time of the death of the testator, Jane Smith was living and had four living children, viz., appellants, Edward H. Smith, Hiram J. Smith and Susan Anglin, and Charles E. Smith, who died intestate in March, 1890, subsequent to the testator's death, leaving him surviving as his only heirs at law, his son, appellee, Earl J. E. Smith, and his widow, Emma N. Smith, who has conveyed to appellee whatever interest she had in the real estate in controversy. The life tenant, Jane Smith, died in March, 1911. Appellants contend that the children of Jane Smith acquired no vested interest in the real estate at the time of the death of the testator, and that their interest in the real estate was contingent upon their survival of their mother, and that inasmuch as appellee's father died before his mother, appellants, the children of Jane Smith, living at the time of her death, take the estate to the exclusion of appellee. On the other hand appellee contends, and the trial court held, that at the time of the death of the testator the children of Jane Smith took a vested remainder in fee in the real estate subject only to the life estate therein of their mother; that appellee's father thereby became the owner of the undivided one-fourth part of the real estate and upon his death it descended to his legal heirs.

The rules of law applicable to the construction of wills containing provisions similar to those here under considera-

tion have been many times stated and we therefore deem it sufficient here to cite some of the decisions wherein they are accurately stated in detail. *Aspy v. Lewis* (1899), 152 Ind. 493, 52 N. E. 756, and cases cited; *Myers v. Carney* (1908), 171 Ind. 379, 84 N. E. 400, and cases cited. Considering all the provisions of the will we do not think it can be said that it evidences a clear intention of the testator to postpone the vesting of the remainder to the time of the death of his daughter, Jane Smith. Conceding that some of the language employed in the will tends to support appellants' contention, yet other portions of it, and particularly the eighth clause, show an intention in harmony with the view that the title vested in the remaindermen at the death of the testator and that only the enjoyment of their real estate was postponed until the termination of the life estate.

Where the language of a will is plain and the intent of the testator is clearly indicated thereby, there is no need of resorting to rules of construction and courts will

3. give effect to the intention so expressed if not contrary to some principle of law. But in this case the provisions of the will, as already indicated, are not harmonious and clear as to the intent, but make a case where it is proper to resort to rules of construction in construing and giving effect to the provisions of the will. *Aspy v. Lewis, supra*; *Taylor v. Stephens* (1905), 165 Ind. 200, 204, 74 N. E. 980; *Clore v. Smith* (1910), 45 Ind. App. 340, 342, 90 N. E. 917. In the absence of a clear expression
4. of intention to the contrary, it will be presumed that the testator in choosing words to express his intention employed them in the light of the settled meaning which the law attaches to such words and expressions.
5. The law favors the vesting of estates at the earliest possible moment, and words of survivorship in a will are construed as referring to the death of the testator in all cases where the language employed does not clearly

Smith v. Smith—59 Ind. App. 100.

and definitely show that they refer to a subsequent date or event. The law also presumes that words post-

6. poning the estate relate to the beginning of the enjoyment of the remainder and not to the vesting of the estate, unless the latter meaning is so clearly expressed as to leave no room for construction.

Without discussing the various provisions of the will in detail, we hold that under the rules of construction the estate in remainder vested upon the death of the

2. testator, subject to the life estate of Jane Smith, and that the facts found show that appellee is the owner of the interest devised to his deceased father. In support of this conclusion we refer to the cases already cited in this opinion and to the following among the numerous decisions in harmony with such conclusion. *Campbell v. Bradford* (1906), 166 Ind. 451, 77 N. E. 849; *Moore v. Hare* (1896), 144 Ind. 573, 43 N. E. 870; *Ancshaensel v. Twyman* (1908), 42 Ind. App. 354, 356, 85 N. E. 788; *Fowler v. Duhme* (1896), 143 Ind. 248, 259, 42 N. E. 623; *Boling v. Miller* (1893), 133 Ind. 602, 604, 33 N. E. 754; *Hoover v. Hoover* (1888), 116 Ind. 498, 19 N. E. 468; *Harris v. Carpenter* (1887), 109 Ind. 540, 10 N. E. 422; *Tindall v. Miller* (1896), 143 Ind. 337, 41 N. E. 535; *Nelson v. Nelson* (1905), 36 Ind. App. 331, 337, 75 N. E. 679; *Heilman v. Heilman* (1891), 129 Ind. 59, 63, 28 N. E. 310; *Bruce v. Bissel* (1889), 119 Ind. 525, 529, 22 N. E. 4, 12 Am. St. 436; *Davidson v. Koehler* (1881), 76 Ind. 398; *Allen v. Mayfield* (1863), 20 Ind. 293.

Appellants rely especially on the case of *Corey v. Springer* (1894), 138 Ind. 506, 37 N. E. 322. Whatever may be the effect of that decision, we hold that, on the facts of this case, it is not controlling, and following numerous cases cited, conclude that the trial court did not err in its conclusions. Judgment affirmed.

NOTE.—Reported in 109 N. E. 60. As to jurisdiction of equity to construe wills, see 129 Am. St. 78. As to the law governing

construction of wills, see 2 L. R. A. (N. S.) 443. As to the rule that wills are to be construed more liberally than deeds, see Ann. Cas. 1913 E 1288. See, also, under (1) 3 C. J. 1407; 2 Cyc. 1913 Anno. 1013-new; (2) 40 Cyc. 1650; (3) 40 Cyc. 1386; (4) 40 Cyc. 1396; (5) 40 Cyc. 1511; (6) 40 Cyc. 1667.

FRANKEL v. VOSS ET AL.

[No. 8,567. Filed June 1, 1915.]

1. **CORPORATIONS.—Process.—Service by Publication.—Collateral Attack.**—The rule that in order to procure valid service on a corporation by publication a summons must first have been issued and a return made by the sheriff thereon disclosing that the corporation had no officer or person authorized to transact its business upon whom process could be served, is not available in a collateral attack on a decree of foreclosure rendered against a corporation by default on service by publication. p. 179.
2. **JUDGMENT.—Collateral Attack.—Jurisdiction.**—Where a judgment or decree has been entered of record by a court of general jurisdiction, it will not be void for want of jurisdiction unless the fact that the court had no jurisdiction affirmatively appears upon the face of the record. p. 180.
3. **JUDGMENT.—Collateral Attack.—Jurisdiction.—Process.**—Before a court can act it must determine that it has jurisdiction to decide the matter presented, which determination is a judicial act as conclusive against collateral attack as any other judicial decision; and, where a court, having jurisdiction of the subject-matter, adjudges that notice was given, such decision will repel a collateral attack, unless the record affirmatively shows that no notice was given, and even though the record shows that the notice was defective and irregular. p. 180.
4. **REAL ACTIONS.—Recovery of Property Sold on Foreclosure Decree.—Limitation of Actions.—Statutes.**—Subdivision 3, §295 Burns 1914, §293 R. S. 1881, providing that actions for the recovery of real property sold on execution shall be brought within ten years after the sale, renders the title of the purchaser at such sale impervious to attack after the expiration of ten years by the execution debtor or anyone claiming under him, even though the sale may have been utterly invalid, and the statute also applies to sales made on foreclosure decrees; hence where the purchaser at a foreclosure sale immediately took possession and he and his grantees continued in open and notorious possession for more than ten years without being disturbed, their title and

right of possession was protected as against one claiming under a corporation that owned the property at the time of the sale, even though the decree was taken by default on alleged defective service by publication. p.180.

5. *NEW TRIAL.—As of Right.—When May be Had.*—Where the complaint stated two substantive causes of action, in only one of which a new trial as of right was demandable, a new trial as of right could not be had; so that in an action by one claiming under defendant in a foreclosure proceeding for the possession of the land sold under the decree, where the complaint, in addition to alleging the facts upon which the right to possession was asserted, also sought an adjudication of the amount of purchase money paid by the purchaser at such foreclosure sale, with interest, and contained an offer to pay such sum to whomsoever the court might direct, etc., a new trial as of right was properly denied. p.182.

From Lake Circuit Court; *Willis C. McMahan*, Judge.

Action by Julius Frankel against Joachim Voss and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

F. L. Welsheimer, A. K. Sills, Jr., and A. K. Sills, for appellant.

Otto J. Bruce, Weir & Worden, O'Donnell & Norton, Oakes & Ames, Nye & Davis and W. Vincent Youkey, for appellees.

MORAN, J.—Appellant commenced this action against appellees for the possession of a certain tract of real estate, on the ground that he was the owner in fee simple thereof, and to have the amount of a lien growing out of a foreclosure proceeding, fixed, in order that he might discharge the lien on the real estate by paying to appellees or to the ones entitled thereto the amount found to be due. By the conclusions of law stated on the facts specially found, appellant was denied the relief sought, and from a judgment rendered against him he appeals. The questions presented for review arise upon the conclusion of law and the refusal of the court to grant a new trial upon written reasons filed, and as a matter of right.

Tersely stated this controversy is waged around the legality of a foreclosure proceeding had against the real estate in question. On November 15, 1890, appellee, Joachim Voss was the owner of the real estate in question, consisting of nineteen acres, located in section 8, township 36, range 8 west, in Lake County, Indiana, and on the date above, he conveyed the same by warranty deed to Arthur E. Clark, for the sum of \$2,000, and to secure \$1,500 of the purchase money, which was unpaid, Clark executed a mortgage thereon to appellee, Joachim Voss. On November 24, 1890, Clark and wife conveyed the same real estate to Peter Stein, subject to the mortgage incumbrance of \$1,500; on December 16, 1890, Peter Stein caused the real estate to be platted into blocks and lots as Germania No. 2 Addition to the town of Tolleston, Indiana, and which since that time has become a part of the city of Gary, Indiana. Stein conveyed by warranty deed to the Tolleston Park Company, a voluntary association, organized under the laws of the State of Indiana, for the purpose of buying, holding and selling real estate; by the provisions of the deed the Tolleston Park Company agreed to pay the mortgage indebtedness against the real estate in the sum of \$1,500. Prior to October 21, 1895, the Tolleston Park Company conveyed to divers persons many of the lots so platted. On the date last mentioned \$500 of the mortgage incumbrance remained unpaid and was past due, and appellee, Joachim Voss filed suit to foreclose the mortgage securing the same, making the Tolleston Park Company, together with the purchasers of the lots aforesaid parties defendant. Notice by publication was given as to the nonresident defendants. As to the Tolleston Park Company, the affidavit stated that the company had no office or place of business in the State of Indiana, so far as the affiant and plaintiff to the action knew; that its main office was in the city of Chicago, but that its officers and employes had left the same without

giving any address as to their whereabouts and upon diligent inquiry the residence of the company was unknown; that it had departed from the State of Indiana, in order to avoid service of summons. After notice by publication for three weeks had been given, all defendants to the suit were defaulted, including those personally served and those served by publication. A decree of foreclosure was entered against the real estate, and on March 21, 1896, the real estate was sold to appellee, Joachim Voss, and on March 27, 1897, the sheriff of Lake County executed to the purchaser a deed for the real estate in question. There was \$783.15 due on the decree against the real estate at the time of the sale. Upon the execution of the sheriff's deed appellee, Joachim Voss, immediately took possession of the real estate, and he and his grantees, who purchased in good faith, remained in open, continuous, adverse and exclusive possession, undisturbed until the filing of the suit. On August 15, 1909, appellant took a quitclaim deed from the Tolleston Park Company for the real estate in question in consideration of \$500; the value at the time of the conveyance was not less than \$12,000. The Tolleston Park Company from its organization to the commencement of the suit in bar was managed and controlled solely by Hurlburd Dunlevy, no records or books were kept by the company, and from 1894 to 1906, he gave the real estate no attention, paid no taxes thereon, nor any of the indebtedness against the same, and he had knowledge of the foreclosure proceedings. Appellant Julius Frankel, at the time he took the quitclaim deed for the real estate, and prior thereto, had knowledge of the foreclosure proceedings.

The theory of appellant is that the foreclosure proceedings and sale as to the Tolleston Park Company were absolutely void for want of notice. On the part of appellee, Joachim Voss, it is the contention as to this branch of the case that the foreclosure proceedings and sale divested the

Tolleston Park Company of all its right, title and interest in and to the real estate in question.

The specific infirmity pressed by appellant is that in order to get valid service upon the Tolleston Park Company, by publication, a summons must first have been issued

1. and a return made by the sheriff thereon, as provided by statute, and that this was a prerequisite and strictly jurisdictional, before service could be had by publication, and without such steps being taken the decree rendered was void. In support of this proposition reliance is placed principally upon *Eel River R. Co. v. State, ex rel.* (1896), 143 Ind. 239, 42 N. E. 617. This decision in construing a statute in reference to service of process upon a corporation, organized under the laws of this State, held that before constructive service could be had the sheriff's return must disclose that the corporation had no officer, or person authorized to transact its business, residing within the county where such corporation had been located, or exercised its powers, upon which process could be served, as required by the act. But in that case the service was directly challenged by a motion to quash the same, therefore, it is not an authority in the case at bar.

The questions of service, jurisdiction both of the subject-matter and of the person, as well as that of a direct and collateral attack on a judgment or decree of a court of general jurisdiction, have recently received much attention by this as well as the Supreme Court, and the authorities have been reviewed and analyzed in the following cases: *Stone v. Elliott* (1914), 182 Ind. 454, 106 N. E. 710; *Larimer v. Krau* (1914), 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936; *Baker v. Osborne* (1914), 55 Ind. App. 518, 104 N. E. 97; *Fricbe v. Elder* (1914), 181 Ind. 597, 105 N. E. 151; *Beavers v. Bess* (1915), 58 Ind. App. 287, 108 N. E. 266; *Sinclair v. Gunzenhauser* (1913), 179 Ind. 78, 98 N. E. 37, 100 N. E. 376. A further analysis and review of the

authorities on this subject would serve no useful purpose.

The rule adduced from these authorities is that when

2. a judgment or decree has been entered of record in a court of general jurisdiction, to render the same void, it is not enough that the court did not in fact have
3. jurisdiction to render it, but the want of jurisdiction must affirmatively appear upon the face of the record;

that before a court acts it must determine that it had jurisdiction to decide the matter presented; and when it had so determined it becomes a judicial act, as final and conclusive against a collateral attack as any other judicial decision. And where the court, having jurisdiction of the subject-matter, adjudges that notice was given, this decision will repel a collateral attack, unless the record of the court affirmatively shows that no notice was given, and this is so although the record shows a defective and irregular notice.

The conclusion we have reached on another branch of this cause makes it unnecessary to determine whether the record affirmatively discloses that a summons was not issued for the Tolleston Park Company, and returned as the statute provides, before resorting to constructive service, nor do we need to decide that if there was a failure to issue summons and a return made thereon by the sheriff that there was no officer or person upon whom service could be had, that it would or would not be such an infirmity within the meaning of the authorities as to render the decree vulnerable to collateral attack for the want of jurisdiction.

The sheriff's sale of the real estate took place on March 26, 1896, and the finding is that the purchaser immediately took possession, and he and his grantees continued

4. in open, notorious and adverse possession for more than ten years, without being disturbed. It is the contention of appellees, that their title and right of possession, after the lapse of ten years, is impervious to an attack by virtue of subdivision 3 of §295 Burns 1914, §293 R. S. 1881, which provides: "For the recovery of real

property sold on execution, brought by the execution-debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, (shall be commenced) within ten years from the date of sale." The scope, purpose and intention of the above provision has been a fruitful source of investigation as is disclosed by the numerous decisions that have reached the appellate tribunals of this State, on this subject. It has been held, "The statute protecting purchasers at sheriffs' sales was not intended to cure mere irregularities,—for mere irregularities will not vitiate a sheriff's sale,—but to prevent the disturbance of titles founded upon a sheriff's sale made under color of authority, although the sale was utterly invalid. Valid sales, of course, need no statute of repose to protect them; it is only the invalid ones that need this protection." *Souders v. Jeffries* (1886), 107 Ind. 552, 8 N. E. 288. See, also, *Brown v. Maher* (1879), 68 Ind. 14; *Hatfield v. Jackson* (1875), 50 Ind. 507; *White v. Clawson* (1881), 79 Ind. 188; *Hawley v. Zigerly* (1893), 135 Ind. 248, 34 N. E. 219; *Orr v. Owens* (1891), 128 Ind. 229, 27 N. E. 493; *Armstrong v. Hufty* (1901), 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; *O'Keefe v. Behrens* (1906), 8 L. R. A. (N. S.) 354, note; *Toll v. Wright* (1877), 37 Mich. 93; *Gray v. Stiver* (1865), 24 Ind. 174. In construing the above provision of the statute, the court makes use of the following language in *Armstrong v. Hufty*, *supra*, "sheriffs' sales, whether void on account of misdescription, or for any other reason, unless it be that the court which rendered the judgment upon which the writ issued had no jurisdiction of the subject-matter, are protected thereby, and that the same applies to a foreclosure sale as well as to sales on ordinary executions." In *Gray v. Stiver*, *supra*, the court said, in reference to the statute under consideration: "This court has held, in a case involving like principles, that the statute applies even when the court has not acquired jurisdiction over the persons of the owners of the land sold.

Frankel v. Voss—59 Ind. App. 175.

VanCleave v. Milliken [1859], 13 Ind. 105; *Vail v. Halton* [1860], 14 Ind. 344. Indeed, the statute would be useless, if it protected only titles which do not need protection." In *Moore v. Ross* (1894), 139 Ind. 200, 38 N. E. 817, it was held that the execution defendant, and those claiming under the execution defendant, have ten years in which to bring an action to recover real estate sold on execution, and during this period the sale is open to every conceivable objection to its validity. That after the expiration of ten years, it is open to no objection that can be urged against it in an action by the execution debtor or his assigns to recover the possession. This was a case where the real estate was bid in by the mortgagee at her own sale. The facts in the case at bar, in the light of the authorities, were sufficient to start the ten-year statute of limitations in operation. The Tolleston Park Company was made a party defendant to the foreclosure proceedings; the indebtedness was past due, a decree *in rem* only was entered, and the record shows service by publication, and the affidavit upon which the notice was based showed a diligent effort to ascertain the whereabouts of the Tolleston Park Company. Whether such service would have been sufficient as against a collateral attack within ten years after the sale is immaterial. The statute being one of repose, we are of the opinion that it affords the appellees protection as against the attack made upon their title and right of possession, after the lapse of ten years.

This leaves for consideration the question as to whether appellant was entitled to a new trial as of right. The complaint, which is in one paragraph, alleges the owner-

5. ship and the right of possession, in appellant of the real estate described therein, and each and every step taken in the foreclosure proceedings, including the sale by the sheriff, and the subsequent conveyances by the purchaser of many of the lots to various parties, who were made defendants, and closes with the following language:

"Plaintiff avers that the said defendant, Joachim Voss, on the 21st day of March, 1896, paid to the sheriff of said Lake County, Indiana, the sum of \$783.15, as and for the purchase price of said real estate under said void decree of foreclosure as aforesaid. Plaintiff alleges that the court should determine the amount of the purchase money paid with interest and fix a time within which the plaintiff in this suit should pay the same and to whom it should be paid. All of which plaintiff alleges that he is willing and offers now to do. Wherefore, the plaintiff demands judgment for possession and that the court ascertain and determine what amount if any is due the defendants or either of them on account of the money paid at the sheriff's sale herein referred to and that the court fix the time within which the plaintiff here shall pay the same and for all other proper relief."

If the complaint is one for ejectment, being an action at law, a new trial as of right should have been granted, on the other hand, if the facts alleged state another substantive cause of action, that of an equitable remedy of redemption, then a new trial as of right was properly refused, the latter being a suit in equity. It has been frequently held that where the complaint states two substantive causes of action, which it may, in one of which a new trial as of right is demandable, and the other in which it is not, a new trial as of right should be refused. *Garrick v. Garrick* (1909), 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104; *Cambridge Lodge, etc. v. Routh* (1904), 163 Ind. 1, 71 N. E. 148; *Nutter v. Hendricks* (1898), 150 Ind. 605, 50 N. E. 748; *Wilson v. Brookshire* (1891), 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792; *Richwine v. Presbyterian Church* (1893), 135 Ind. 80, 34 N. E. 737; *Butler University v. Conard* (1884), 94 Ind. 353; *Bradford v. School Town of Marion* (1886), 107 Ind. 280, 7 N. E. 256. In *Bennett v. Closson* (1894), 138 Ind. 542, 551, 38 N. E. 46, it was said, "As to the actions of redemption, subrogation, and foreclosure,

it does not admit of question that a new trial as of right is not allowable. These are substantive causes of action in the case, and, under the decisions cited must control. A new trial as of right cannot be granted in the whole case." In *Aetna Life Ins. Co. v. Stryker* (1908), 42 Ind. App. 57, 83 N. E. 647, a new trial as of right was refused where the right to redeem and to quiet title was asked in the same complaint. In *Voss v. Eller* (1887), 109 Ind. 260, 10 N. E. 74, a new trial as of right was refused where the right of redemption was pleaded with that of the right of cancellation of a mortgage. The complaint in the case at bar discloses that appellant asks to do equity, in this, he alleges that he is willing and offers to pay whatever amount the court should determine that he should pay by reason of the sale by the sheriff. He likewise asks that the time be fixed when he should pay the same. From the general scope of the complaint, the conclusion must be reached that it contains two substantive causes of action, one an action at law, that of ejectment, and the other a suit in equity, that of redemption. Therefore a new trial as of right was properly refused.

Many of the questions specifically presented by appellant's able counsel, have not been discussed, for the reason they are covered in a general way by what we have said as to the ten-year statute of limitations being applicable to the facts as presented by the record, and no useful purpose can be accomplished in extending this opinion by a specific discussion of the other questions.

There is no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 109 N. E. 55. As to what are collateral attacks upon judgments, see 23 Am. St. 104. On the right of one in possession under void foreclosure sale as affected by statute of limitations, see 40 L. R. A. (N. S.) 846. See, also, under (1) 23 Cyc. 1077; (2) 23 Cyc. 1085, 1086; (3) 11 Cyc. 701; 23 Cyc. 1079; (4) 25 Cyc. 1030; (5) 29 Cyc. 1037, 1036, 1034.

DEAL ET AL. v. PLASS.

[No. 8,634. Filed June 2, 1915.]

1. **APPEAL.—Briefts.—Sufficiency.**—Appellants' brief, though subject to criticism, will be treated as sufficient if there is such substantial compliance with the rules as to enable the court to determine therefrom the question for consideration. p. 187.
2. **MECHANICS' LIENS.—Statutes.—Construction.**—Mechanics' lien statutes, though strictly construed in determining the persons entitled to acquire and enforce such liens, are remedial in character and are to be liberally construed in favor of those entitled to their benefits. p. 188.
3. **MECHANICS' LIENS.—Foreclosure.—Notice of Lien.—Sufficiency of Description.**—Where it was conceded that plaintiff in a proceeding to foreclose a mechanic's lien was within the provisions of the statute, and there were no rights of third persons involved, the court did not err in decreeing a foreclosure, although the real estate described in the notice was not that on which plaintiff's labor was performed, where it was alleged and proven that the house on which plaintiff performed the labor was the only house erected or repaired by defendants and that the lot on which it was situate was across the street from the lot described in the notice, and which defendants also owned; since the statute was to be liberally construed in such case, and the notice, by mentioning the work performed, contained sufficient reference by which the lot on which the house was located could be identified. p. 188.

From Elkhart Superior Court; *James L. Harmon*, Judge.

Action by John I. Plass against Leonard Deal and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Otto E. Deal and *James H. State*, for appellants.

Perry L. Turner, for appellee.

FELT, J.—Appellee filed his complaint to foreclose a mechanic's lien on appellants' real estate in Elkhart County, Indiana, described as follows: "Commencing at the southwest corner of lot No. one hundred sixty-two (162) in the Second South & Western Addition, in the city of Elkhart; thence north three (3) degrees, east two hundred fifty-

seven (257) feet; then westwardly, parallel with the northerly line of High Street, to the St. Joseph River; thence southerly, along the curves of said River to the point of the intersection with the north line of High Street; thence easterly, along the northerly line of High Street to the place of beginning.”

It is averred that on or about July 4, 1910, the owners of said real estate, appellants, employed appellee to construct a cement floor in the cellar of their house on said real estate, and agreed to pay him \$45 for the necessary labor and material; that he fully performed his contract and there is due him therefor \$45; that at appellants' request he did some brick work of the value of \$2. The complaint also alleges facts which show the filing of a notice about which no question is raised except as to the description of the property as to which it is alleged “that in the description of said real estate a mistake was made in this, that the description in said lien was written as Lot No. 164, in the Second South & Western Addition to the city of Elkhart, in Elkhart County and State of Indiana”; that appellants were, at said time, the owners of said Lot No. 164; “that the real estate first described above and upon which the house was located wherein he constructed said cellar and did said brick work is located upon the north side of High street * * * a short distance westwardly from a point opposite said Lot No. 164”; that the house of appellants “located upon the real estate first described herein was the only house erected or repaired by the defendants, in the city of Elkhart, during the year of 1910, and the only house of said defendants in which he constructed a cellar floor or did brick work.”

The notice of lien as far as material here is as follows:

“Mechanic's Lien. September 1st 1910. To Leonard Deal, Adelia Deal and to whom else it may concern:—Take notice that I intend to and do hold a lien on the following described real estate situate in the city

Deal v. Plass—59 Ind. App. 185.

of Elkhart, Elkhart County and State of Indiana, viz., Lot No. one hundred sixty-four (164) in the Second South & Western Addition to the City of Elkhart, in the sum of \$47 for work, labor and material furnished and performed, done and used in and upon the erection and repair of the house on said real estate at your special instance and request, within the sixty days last past.”

Appellants filed a motion to strike out parts of the complaint which motion was overruled. The cause proceeded to trial without answer by appellants. There was a finding and judgment in favor of appellee, and a decree foreclosing the lien on the property first above described, and ordering the same sold.

Appellants’ motion for a new trial was overruled. The errors assigned are the overruling of appellants’ motion to strike out a part of the complaint, and the overruling of their motion for a new trial.

Appellee insists that appellant’s brief is insufficient to present any question. The briefs are subject to criticism

but show such substantial compliance with the rules

1. as to enable us to ascertain therefrom that the controlling question is: Did appellee by virtue of the notice filed acquire an enforceable lien on the property ordered sold?

Appellants admit that a defective description may be aided by extrinsic facts and that it will be sufficient if by such means it can be identified with certainty, but assert that the notice in this case accurately described an entirely different lot, and is radically defective in failing to give any description of the real estate described in the complaint and against which it is sought to enforce the lien; that as against such property the notice of lien is void and the court therefore erred in decreeing foreclosure thereof. The statute (§8297 Burns 1914, Acts 1909 p. 295) provides that, “Any description of the lot or land in a notice of a lien will be sufficient, if from such description or any reference therein, the lot or land can be identified.”

Mechanics' lien statutes are strictly construed in determining the persons entitled to acquire and enforce such liens, but they are remedial in character and should

2. be liberally construed to carry into effect the object of the law in giving a lien to those entitled to its benefits. *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 17, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85; *Cincinnati, etc., R. Co. v. Shera* (1905), 36 Ind. App. 315, 318, 75 N. E. 293.

There is no dispute on the proposition that appellee comes within the provisions of the statute and for that reason the statute is to be liberally construed. The question

3. arises here between the property owners and the one who performed the labor and does not involve the rights of third persons relying on the record of the notice. The notice complies with all the provisions of the statute unless it be in respect to the description of the property. The statute requires a substantial description of the real estate in the notice and provides that it will be sufficient if from it or any reference therein the lot or land can be identified. The notice shows that the property is in the city of Elkhart and that the lien is for labor and material furnished by appellee and used in the repair of appellants' house at their special instance and request. It is averred in the complaint that the house of appellants situate on the real estate described by metes and bounds as aforesaid is the only house erected or repaired by appellants in the city of Elkhart in the year 1910, and the only house of theirs in which appellee constructed a cellar floor or did brick work; that the house is situated on the opposite side of the street on which the lot described in the notice abuts and a short distance west thereof. The reference in the notice to appellants' property in which the work was done by appellee at their special instance and request, and the fact that both lots are on the same street in the same county and city, aided by the averments of the complaint, bring

Parker v. First Nat. Bank—59 Ind. App. 189.

the case clearly within the spirit of the statute and so far within its provisions that as between the original parties to such contract the lien may be upheld and enforced against the real estate on which the house so improved stands. *Hill-yard v. Robbins* (1913), 53 Ind. App. 107, 110, 101 N. E. 341; *McNamee v. Rauck* (1891), 128 Ind. 59, 61, 27 N. E. 423; *Smith v. Newbaur* (1896), 144 Ind. 95, 100, 42 N. E. 40, 1094, 33 L. R. A. 685; *Newcomer v. Hutchins* (1884), 96 Ind. 119; *White v. Stanton* (1887), 111 Ind. 540, 543, 13 N. E. 48; *Windfall, etc., Oil Co. v. Roe* (1908), 41 Ind. App. 687, 690, 84 N. E. 996; *Coburn v. Stephens* (1894), 137 Ind. 683, 685, 36 N. E. 132, 45 Am. St. 218; *Maynard v. East* (1895), 13 Ind. App. 432, 435, 41 N. E. 839, 55 Am. St. 238.

No reversible error is shown. Judgment affirmed.

NOTE.—Reported in 109 N. E. 51. As to buildings and other property subject to mechanics' liens, see 78 Am. Dec. 694. See, also, under (1) 3 C. J. 1407; 2 Cyc. 1913 Anno. 1013-new; (2) 27 Cyc. 20; (3) 27 Cyc. 122.

PARKER ET AL. v. THE FIRST NATIONAL BANK OF FORT WAYNE.

[No. 8,599. Filed June 3, 1915.]

1. **BILLS AND NOTES.—Payment.—Recovery of Payment.—Cancellation of Note.**—On a complaint to recover money paid and to cancel a note executed by plaintiffs, alleging that a commission firm had arranged with defendant bank to advance money for live stock purchased for it by the plaintiffs, and in doing the business the bank required plaintiffs to make a draft on the commission firm for the amount advanced by the bank on each purchase, that plaintiffs did not understand that they assumed any liability by so doing, that on dishonor of one of the drafts the bank insisted on payment by plaintiffs and to that end held up the personal funds of plaintiffs, and that thereupon plaintiffs, under mistake as to their legal rights, paid part of the draft in cash and executed their note for the balance, no such mistake, fraud, duress or coercion was shown as would entitle plaintiffs

Parker v. First Nat. Bank—50 Ind. App. 189.

to the recovery of the money paid on such draft, or to a cancellation of the note executed for the balance. pp. 192, 194.

2. *PAYMENT.—Recovery of Voluntary Payment.—Payment Under Mistake of Law.*—A voluntary payment can not be recovered even though the claim or demand paid was unjust or illegal, nor can money paid with full knowledge of all the facts and circumstances upon which it was demanded, or with the means of such knowledge, be recovered on the ground that it was paid under the payor's mistaken belief that he was legally bound to pay it. p. 193.

From Wells Circuit Court; *Wm. H. Eichhorn*, Judge.

Action by Sheldon B. Parker and another against The First National Bank of Fort Wayne. From a judgment for defendant, the plaintiffs appeal. *Affirmed.*

Samuel M. Hench and *Samuel R. Alden*, for appellants.

Vesey & Vesey, for appellee.

MORAN, J.—Appellants brought a suit to recover an indebtedness alleged to be due them from appellee, and to cancel a promissory note, calling for \$300, held by appellee, which they had theretofore executed. They were denied relief, and the note sought to be cancelled was reduced to judgment against them upon a cross-complaint, filed by appellee. From this judgment an appeal has been prayed.

Errors relied upon for reversal are (1), error in sustaining appellee's demurrer to the amended third paragraph of appellants' complaint; (2), error in sustaining appellee's demurrer to appellants' amended third paragraph of answer to appellee's cross-complaint.

The facts alleged in the amended third paragraph of complaint and the amended third paragraph of answer addressed to appellee's cross-complaint do not differ materially. Putting aside the irrelevant matter, the material facts alleged in each of the pleadings under consideration are: in the year 1905, appellants as partners, with their place of business at Hometown, Allen County, Indiana, were engaged in buying live stock; and C. F. Pfeiffer and Sons, a commission firm of East Buffalo, New York, entered into an agree-

ment with appellants, whereby they were to purchase for C. F. Pfeiffer and Sons live stock, the necessary money to carry on the business, to be furnished by C. F. Pfeiffer and Sons, at appellee's bank, the live stock to be purchased in carload lots and shipped to C. F. Pfeiffer and Sons at East Buffalo, New York. Appellee, a corporation, engaged in a general banking business at Fort Wayne, obligated itself in the presence of Christian F. Pfeiffer, a member of the firm of C. F. Pfeiffer and Sons, and Sheldon B. Parker, a member of the firm of Parker and Simon, to furnish on account of C. F. Pfeiffer and Sons, on the request of appellants from time to time, the necessary money to pay for the live stock before the same was shipped to C. F. Pfeiffer and Sons at East Buffalo, New York; and from the time of entering into the agreement until October 28, 1908, appellants, under the agreement and arrangement, purchased and shipped to C. F. Pfeiffer and Sons a large quantity of live stock; appellee adopted for the purpose of its business with C. F. Pfeiffer and Sons, relative to the payment of funds to appellants for the use of C. F. Pfeiffer and Sons, a form of sight draft drawn by appellants on C. F. Pfeiffer and Sons for each payment, under the arrangement and agreement made, without intending to obligate appellants by reason of drawing such drafts. Appellants at appellee's request formally signed the drafts on receipt of such payments, without any intimation or suggestion by appellee that it expected appellants to assume any liability for such funds, nor were appellants ever informed by appellee until October 28, 1908, when the last of such drafts calling for \$950 had been dishonored at Buffalo, New York, that it claimed appellants were responsible to it for any such funds. The amount of \$950 was paid by appellants for a carload of live stock, which was shipped to C. F. Pfeiffer and Sons, who sold the same for \$1,033. Sometime after the draft had been dishonored, appellee demanded payment of the same from appellants, and refused to cash two certificates of deposit held by appellants

representing personal funds in appellee's bank. Appellants in ignorance of their rights, and by reason of their personal funds being refused them by appellee, paid a part of this draft in cash, and executed their note in the sum of \$300 for the balance. Appellee knew appellants were not liable for the payment of the draft but with a fraudulent intent asserted that they were liable, and refused the payment of their personal funds, held on deposit, with the intent of forcing them without consideration to pay the indebtedness of C. J. Pfeiffer and Sons. Appellants believed when they signed the drafts from time to time drawn on C. F. Pfeiffer and Sons, that it was appellee's method of doing business with C. F. Pfeiffer and Sons, and never knew until it demanded payment of the amount of the draft and refused to pay their individual funds on deposit, that it considered them obligated to pay the amount of the draft. They were ignorant as to whether they were liable, as claimed by appellee, and gave their note, supposing they were liable in some way, which they could not comprehend; and not until 1911, did they learn for the first time that they were not liable for the payment of the draft. Judgment was demanded by the complaint for the money paid to the bank in the sum of \$650 and to cancel the note. The answer went to the entire cross-complaint that appellee take nothing thereby.

Appellee's cross-complaint, to which the answer was addressed, was predicated upon the \$300 note and was in the usual form of a pleading based upon an obligation of this character.

Appellants contend that they were purchasing agents of live stock in the vicinity of Fort Wayne, Indiana, for C. F.

Pfeiffer and Sons, which was a commission firm of

1. Buffalo, New York, and that the draft, which they were compelled to pay, a part in cash and a part by promissory note, was the debt of C. F. Pfeiffer and Sons, and that under the circumstances, they were entitled to recover back the money paid and have the note cancelled. It

will be observed that the complaint alleges that by the arrangements made between appellee and C. F. Pfeiffer and Sons, there was no intention on the part of appellee to look to appellants for the payment of the money advanced by it to pay for live stock shipped to C. F. Pfeiffer and Sons at East Buffalo, New York. That the signing of the drafts by appellants and drawn on C. F. Pfeiffer and Sons was the method adopted by appellee to reimburse itself for the money advanced for the purchase of the live stock. It will be further noticed by the allegations of the complaint that for over two years appellee advanced the money for each shipment of live stock to C. F. Pfeiffer and Sons, and that it was reimbursed for each shipment sent forward by a draft drawn by appellants on C. F. Pfeiffer and Sons. There came a time, however, on October 28, 1908, as disclosed by the complaint, when a draft calling for \$950 was not paid by C. F. Pfeiffer and Sons, and upon learning of the non-payment of the same appellee demanded payment of appellants and the same was paid by appellants in the manner heretofore mentioned. Irrespective of the alleged obligation on the part of appellee to furnish the money to pay for the live stock, without looking to appellants therefor, the relation of appellants to the transaction was such that unless the payment of the draft was through mistake, fraud, duress or coercion, they cannot recover the same back. *Lemans v. Wiley* (1884), 92 Ind. 436; *Darling v. Hines* (1892), 5 Ind. App. 319, 32 N. E. 109; *Town of Brazil v. Kress* (1876), 55 Ind. 14; *Colglazier v. Town of Salem* (1878), 61 Ind. 445; *Lafayette, etc., R. Co. v. Pattison* (1872), 41 Ind. 312; *Town of Edinburg v. Hackney* (1876), 54 Ind. 83; *Ingalls v. Miller* (1889), 121 Ind. 188, 22 N. E. 995.

And it is likewise the law, that even though a claim or demand be unjust and illegal, and it is paid volun-

2. tarily, the one paying the claim or demand under such circumstances can not recover the same back. Like-

wise where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it can not be recovered back on the ground that the party supposed he was bound in law to pay it, when in truth he was not. *Lafayette, etc., R. Co. v. Pattison, supra*; *Hines v. Board, etc.* (1884), 93 Ind. 266; *Ingalls v. Miller, supra*; *Powell v. Bunger* (1881), 79 Ind. 468; *McWhinney v. City of Logansport* (1892), 132 Ind. 9, 31 N. E. 449; *Martin v. Stanfield* (1861), 17 Ind. 336; *Bond v. Coats* (1861), 16 Ind. 202.

Recurring again to the paragraph of complaint under consideration, it discloses no more when carefully analyzed than that the officers of the bank insisted on appel-

1. lants applying money they had on deposit with it to a discharge in part of the protested draft, to which their names were attached, and insisted that appellants execute their promissory note for the balance. Appellants were familiar with all the facts at the time and prior to the payment of the money and the executing of the note above mentioned. The note, a copy of which is made a part of the cross-complaint, was executed more than two years after the protesting of the draft. While the record is silent, indirectly appellants' brief discloses the note sued on in the cross-complaint to be a renewal of the original, but this does not strengthen appellants' case. In *Bond v. Coats, supra*, it was said: "There is no pretense that the defendant made the promise to pay, or the payment on the agreement, under any mistake as to the facts, or fraud in reference to the circumstances. He had full knowledge of them; but alleges he was mistaken as to his rights, in a matter in which he had constituted himself a judge in his own cause, and decided against himself. We are of opinion that the weight of authority is that he can not now be heard to reverse his own judgment."

Neither mistake, fraud nor coercion is sufficiently alleged in the complaint to warrant a recovery, and applying the

Miller v. Ready—59 Ind. App. 195.

law to the facts, as disclosed by the entire paragraph of complaint, the payment of the money and the execution of the note were not involuntary. The trial court committed no error in sustaining the demurrer to the amended third paragraph of complaint and to the third paragraph of answer addressed to the cross-complaint. Judgment affirmed.

NOTE.—Reported in 109 N. E. 75. As to what is and what is not duress, see 26 Am. Dec. 374. See, also, under (1) 30 Cyc. 1324; (2) 30 Cyc. 1298, 1313

MILLER, ADMINISTRATRIX, v. READY.

[No. 9,013. Filed April 22, 1915. Rehearing denied June 4, 1915.]

1. LANDLORD AND TENANT.—*Lease.—Implied Covenant for Possession.—Breach.—Rights of Lessee.*—Where a lease expressly provided that the term was to commence on a certain day, such provision amounted to an implied covenant of the lessor to put the lessee in possession on such day, and that the premises would not at that time be in the possession of another; so that the fact that a former occupant had not completely vacated the premises by that date, in the absence of anything to show that the lessee had waived his right to possession at that time, would have warranted the lessee's administrator in treating the lease as abrogated, and in refusing to take possession or to be bound by any of the provisions of the lease. p. 199.
2. LANDLORD AND TENANT.—*Lease.—Breach of Covenant for Possession.—Waiver of Breach.*—Where a lessor's failure to place the lessee in possession on the date fixed for the commencement of the term was due to an arrangement between the lessee and the occupant then in possession, made with the knowledge and consent of the lessor, whereby such occupant might hold over if not convenient to surrender possession at the commencement of lessee's term, the administrator of the lessee's estate, on the death of lessee prior to the beginning of the term, could not treat the lease as abrogated for failure to be placed in possession at the time therein specified. p. 200.
3. EXECUTORS AND ADMINISTRATORS.—*Privity of Administrator With Deceased Lessee.—Estoppel.*—The administrator of the estate of a deceased lessee stands in privity with his decedent and has no greater rights under the lease than decedent could have had, and hence is estopped from treating the lease as abrogated by a breach of the lessor which was induced by decedent. p. 201.

4. **CONTRACTS.—Death of Party.—Effect.**—Ordinarily the death of either party to a contract does not extinguish it, unless it is of a personal character and not susceptible of performance by the personal representative of such deceased party; and in determining whether it may be performed by such representative regard must be had both to the nature of the transaction and the language in which the contract is couched. p. 201.
5. **CONTRACTS.—Termination by Death.—Leases.**—An ordinary lease of real estate is not such a personal contract as is annulled or extinguished by the death of either party thereto. p. 202.
6. **LANDLORD AND TENANT.—Death of Lessee.—Rights and Liabilities of Administrator.**—On the death of a lessee the term of the unexpired portion of his lease becomes a personal asset of the estate to be inventoried, appraised and sold as other personal property; and, until in some manner released or discharged, the administrator is bound to perform the covenants of the lease and is liable for the rents to the extent of the assets in his hands. p. 202.
7. **LANDLORD AND TENANT.—Lease.—Construction.—Personal Contracts.**—A lease of real estate does not assume the character of a personal contract so as to terminate on the death of the lessee, by reason of a stipulation therein that the premises are to be occupied by the lessee for a definite purpose and are not to be sublet, or otherwise occupied, or the lease assigned, without the written consent of the lessor, since such covenants though restrictive, are for the benefit of the lessor and may be waived. p. 203.
8. **LANDLORD AND TENANT.—Lease.—Covenant Against Assignment.—Transfer to Administrator of Deceased Lessee.**—On the death of a lessee the lease passes into the hands of the administrator as a part of the assets of the estate by operation of law, in the absence of an express stipulation to the contrary, regardless of a covenant against assignment. p. 204.
9. **LANDLORD AND TENANT.—Lease.—Construction.—Transfer by Operation of Law.**—Stipulations in a lease that the premises were to be occupied by the lessee for a specific purpose, and were not to be sublet or otherwise occupied, or the lease assigned, without the written consent of the lessor, can not be construed as to prevent a transfer of the lease by operation of law, so as to relieve the administrator of the deceased lessee's estate from liability for the rent. pp. 204, 205.
10. **LANDLORD AND TENANT.—Leases.—Construction.—Restrictive Covenants.**—Restrictive covenants in a lease, such as covenants against assignments or subletting, are not favorably regarded and are to be construed so as to prevent the restriction from extending any further than is necessary. p. 205.

Miller v. Ready—59 Ind. App. 195.

11. LANDLORD AND TENANT.—*Covenant for Repairs.*—*Death of Lessee.*—*Liability of Administrator.*—Where a lease providing that all inside repairs were to be made by lessee, was repudiated by administrator of lessee's estate, and, in an action to recover the rents for the time the premises remained unoccupied, together with the expense incurred in again renting them, there was evidence to show that repairs to the interior made by lessor before procuring the new tenant were reasonably necessary, the court did not err in allowing the lessor his reasonable expenses thus incurred. p. 205.

From Probate Court of Marion County (10,463); *Frank B. Ross*, Judge.

Action by Michael J. Ready against Ida L. Miller, administratrix of the estate of James U. Miller, deceased. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Addison C. Harris and *F. A. Redmond*, for appellant.

Aquila Q. Jones, *William W. Hammond* and *Walter D. Jones*, for appellee.

CALDWELL, P. J.—On June 20, 1912, appellee and appellant's decedent joined in the execution of a certain lease, the terms of which, material to the present controversy, are as follows:

“This indenture witnesseth that Michael J. Ready, of the County of Marion, and State of Indiana, has this day demised and leased to James U. Miller, of said county and state, and to his executors, administrators and assigns, the following premises in said county and state, to wit, Number 358 South Meridian Street, in the City of Indianapolis * * * to have and to hold the same for and during the term of three years * * * from the first day of October, 1912. The said James U. Miller hereby agrees and promises to pay as rent for said premises the sum of One Hundred Dollars per month, the said rent to be paid on the first day of each month in advance * * *. The conditions of this lease are, that the premises are to be used and occupied by James U. Miller, for the sale of oil, belting and a general line of supplies, and for no other purpose; * * * that the premises are not to be sub-leased by the said James U. Miller, or occupied by other persons, or for other purposes than herein expressed, nor this lease assigned

Miller v. Ready—59 Ind. App. 195.

by the said James U. Miller, without the written consent of said Michael J. Ready; * * * the lessor agrees to keep the outside of the building in repair, except the windows; the lessee agrees to make all inside repairs
* * *.”

James U. Miller died intestate, August 14, 1912. At the time of the execution of the lease, the premises were occupied by The White Swan Distilling Company, as appellee's tenant, which occupancy continued until several days after October 1, 1912. As a consequence, appellant, as administratrix of the Miller estate, did not acquire possession of the premises at the time fixed for the beginning of the term. After the prior tenant had vacated the premises, appellee refused to take possession, justifying the refusal on the grounds, among others perhaps, that the lessor having failed to deliver possession at the beginning of the term, the lease ceased to be binding on the estate. The premises stood idle until February 1, 1913, when they were leased to other parties at a rental of \$100 per month.

Appellee commenced this action by filing a claim against the Miller estate, to recover rent for the period from October 1, 1912, to February 1, 1913, at \$100 per month, and also to recover on account of certain expenses alleged to have been necessarily incurred in procuring a tenant. A trial by the court resulted in a finding and judgment in appellee's favor for \$620.90.

Appellant contends that the evidence is insufficient to sustain the finding. In support of such contention, appellant advances two arguments: (1) that at the time named for the beginning of the term, under the lease, appellee did not and was not in position to place the estate in possession of the leased premises, and that as a consequence, appellant, as a representative of the estate was authorized to and did repudiate the lease, and that therefore the estate was not chargeable with any liability thereunder; (2) that by the terms of the lease, the contract thereby made was personal to James U. Miller, and terminated at his decease. There

was evidence to sustain the following further facts bearing on the first argument. Mr. Webber, president of The White Swan Distilling Company, had some fears that the occupant of the premises to which the distilling company intended to move on October 1, might purposely hold possession until the last moment, and that his company might thereby be delayed a few days in vacating the Ready premises. He, therefore, at the time of the execution of the lease, or at some subsequent time, in the presence of Ready, apprised Miller of these facts, whereupon Miller said: "Any time you folks get out is all right. I don't care how long you stay, as I don't have to move out of the corner. * * *

As long as I don't have to move, you can stay as long as you want to; it don't make any difference to me; I don't need the room." Ready thereupon or thereafter instructed Webber to deliver the keys to Miller or to The Miller Oil Company, the latter being the name under which Miller conducted his business. The distilling company removed all its property, except the safe, from the Ready room on October 1. The safe was moved out October 3. On October 4, Webber tendered the keys at the office of The Miller Oil Company, but the young woman in charge, acting under the instructions of the attorney for the estate, declined to accept them. On October 9, Webber tendered the keys to the administratrix, but she also refused to accept them. No representative of the estate at any time demanded or sought to gain possession of the room. There was no evidence of anything said or done at any time, by which whatever status was created by the arrangement made between Miller and Webber was nullified or changed.

By the terms of the indenture, appellee demised and leased the described premises to Miller for a term expressly stipulated to commence October 1, 1912. Appellee there-

1. by impliedly covenanted to put Miller in possession of the premises at that time, and as a necessary incident that there should be no impediment to him or his rep-

representatives taking possession, as that at such time the premises should be open to occupancy and not in possession of another. This implied covenant was not discharged. By reason of the occupancy of the distilling company, appellee was not in a position to discharge it. These facts considered alone constituted such a breach of the implied covenant as to justify appellant in treating the contract as abrogated, and in refusing thereafter to take possession or to be bound by any of the provisions of the lease. *Cleveland, etc., R. Co. v. Joyce* (1913), 54 Ind. App. 658, 103 N. E. 354; *Voss v. Capital City Brew. Co.* (1911), 48 Ind. App. 476, 96 N. E. 11; *Hickman v. Rayl* (1877), 55 Ind. 551; *Huntington, etc., Co. v. Parsons* (1907), 62 W. Va. 26, 57 S. E. 253, 125 Am. St. 954, 9 L. R. A. (N. S.) 1130; 1 *Tiffany, Landlord and Tenant* 1147; 24 *Cyc.* 1050.

While, by giving effect to the terms of the lease alone, it was appellee's duty to deliver possession of the premises

October 1, and Miller or his representative had a

2. right to possession on that day, and failing to acquire it, to repudiate the lease, nevertheless, we can not ignore the arrangement made between Miller and Webber, with the knowledge and consent of appellee. It is not necessary to our purpose that we follow the arguments into a determination of the particular kind of a tenancy, if any, that was thereby created in the distilling company. There was no valuable or legal consideration for the agreement made between Miller and Webber, and the specification of the time during which the distilling company might remain in possession was entirely indefinite, and for these reasons, doubtless the distilling company could not have held possession as against Miller, or his representatives for any stated time. But here, appellant is asking that it be determined that said lease became nonenforceable as against the Miller estate, and that the estate be relieved from his solemn obligation to pay rent, by reason of the breach of an implied covenant to deliver possession, and in the face of the fact

that Miller himself induced the very breach of which the estate is now seeking to avail itself. Miller agreed that the distilling company might hold over. Appellee knew of such agreement. He was thereby induced to feel secure in permitting Miller and the distilling company to arrange between themselves for the transfer of possession and in taking no steps to require that the premises be vacated by October 1. It would have been grossly inequitable to permit Miller, had he lived, to view passively a situation which he had created, and by reason of a delay which he authorized, in getting a possession which he did not seek, to declare the lease no longer of effect. Equity and good conscience would have required of him that he undertake no such drastic step until by a prior notice, affording a reasonable time, he had given appellee opportunity to relieve himself from his situation of

fancied security so created. Appellant stands in 3. privity with Miller, and her rights are not superior to what his would have been had he lived. Under the circumstances, we hold that appellant is estopped by the conduct of her predecessor in interest from asserting the invalidity of the lease, based on a breach of such implied covenant. *Templer v. Muncie Lodge, etc.* (1912), 50 Ind. App. 324, 97 N. E. 546; *Consumers Gas Trust Co. v. Littler* (1904), 162 Ind. 320, 327, 328, 70 N. E. 363; 16 Cyc. 805. As having some bearing on the question, see also, note to *O'Connor v. Timmerman* (1909), 24 L. R. A. (N. S.) 1063; *Garbutt v. Mayo* (1907), 13 L. R. A. (N. S.) 98, note.

Turning our attention to appellant's second argument, ordinarily the death of either of the parties to a contract does not extinguish it, if it is of such a nature that it

4. may be performed by the personal representative.

Williams v. Buller (1915), 58 Ind. App. 47, 105 N. E. 387, 107 N. E. 300; *Cox v. Martin* (1897), 75 Miss. 229, 21 South. 611, 65 Am. St. 604, 36 L. R. A. 800; *Day v. Worcester, etc., R. Co.* (1890), 151 Mass. 302, 23 N. E. 824. Thus, where the work contemplated by the contract does not re-

quire the services or superintendence of the promisor in person, his death or disability does not terminate the contract, as there may be performance by proxy. In determining whether it may be so performed, and consequently in ascertaining the character of the contract, regard must be had not only to the words in which the contract is expressed, but also to the nature of the transaction. Bishop, Contracts §§603, 860. Thus, where the performance of an executory contract requires the services of a person of special characteristics or peculiar skill or taste, and a person is chosen to do the work, either expressly or presumably by reason of his possessing such attributes, a contract so arising ordinarily terminates with the death of the person so employed. Such contracts are sometimes denominated contracts for personal services. The following are examples: Contracts of authors to write books; of attorneys to render professional services; of physicians to cure particular diseases; of teachers to instruct pupils; and of masters to teach apprentices a trade or calling. 1 Beach, Contracts §231. See, also, *Campbell v. Faxon* (1906), 5 L. R. A. (N. S.) 1002, note. But an ordinary lease of real estate is not such

5. a personal contract as is annulled or extinguished by the death of either of the parties thereto. In case of the death of the lessee, the term or the unexpired portion thereof becomes a part of the personal assets of the estate, to be inventoried, appraised and sold as other personal property. Until in some manner released or discharged, it devolves upon the administrator to perform the covenants of the lease, and he is liable for the payment of the rent reserved, to the extent that he has assets in his hands. *Smith v. Dodd* (1871), 35 Ind. 452; *Cunningham v. Baxley* (1884), 96 Ind. 367; *Schee v. Wiseman* (1881), 79 Ind. 389; *Drummond v. Crane* (1893), 23 L. R. A. 707, note; *Wilcox v. Alexander* (1895), 32 S. W. (Tex.) 561; *Alsup v. Banks* (1891), 68 Miss. 664, 9 South. 895, 24 Am. St. 294, 13 L. R. A. 598; 1 Tiffany, Landlord and Tenant 352; 24 Cyc.

1340; 18 Cyc. 312; Schouler, Executors and Administrators §223.

It is apparent from a consideration of the foregoing principles, aside from any effect that must be given to the special contents of the indenture, that in the case at

7. bar, the decease of Miller did not terminate the contract of lease, or relieve his estate from the obligation to pay rent as covenanted. Appellant, however, appeals to the terms of the contract, and argues that since the lease stipulates that the premises were to be occupied by Miller for only a certain purpose, and that the premises were not to be subleased or occupied by other persons or for other purposes, or the lease assigned, without the written consent of Ready, the parties must have contemplated a contract personal to Miller, and to terminate at his death. The argument is that since the right to occupy was limited to Miller, the parties must be held to have intended a termination of contractual rights and obligations should occupancy by Miller be rendered impossible by his death. Giving full weight to the argument in other respects, it is fallacious in this, the stipulations do not prohibit occupancy by other persons than Miller or the conduct of other enterprises than that named, or the transfer of the whole or a part of the term, but rather that these things may not be done without the consent of Ready. It follows that any or all of them might be done with such consent. Thus, assuming the argument to be sound in other respects, we would be forced to the conclusion that the contract was personal to Miller not absolutely, or at his election or the election of those who represent him, but rather at the election of Ready. It is well to bear in mind that in this contest, Ready is not denying the rights of some one who claims to hold by assignment or otherwise from Miller—that is, Ready is not seeking to enforce the restrictive covenants of the lease, but rather here Miller's representative is endeavoring to enforce such covenants, and thereby to treat the lease as personal

to Miller, while Ready, by his attitude, is indicating a purpose and election to treat it otherwise. Restrictive covenants, respecting the use to which the premises may be put and the transfer of the lease or of any interest therein, are construed as made for the benefit of the lessor rather than the lessee. It follows that such covenants may be waived by the former. *Hancock v. Diamond Plate Glass Co.* (1904), 162 Ind. 146, 152, 70 N. E. 149; *Edmonds v. Mounsey* (1896), 15 Ind. App. 399, 44 N. E. 196; 1 Tiffany, Landlord and Tenant 932, 941; 24 Cyc. 963, 968, 1063. That such rule is sound in principle, as applied here, appears from a further consideration of the lease contract. Among its provisions is one to the effect that on a failure to pay rent when due, or on a failure to comply with any of the conditions of the lease, it shall terminate at once, without notice, etc. If such were not the rule, the lessee, desiring to be free from the obligations of the lease, might, for the express purpose of terminating it, wilfully violate its covenants, and thus profit from his own wrong. Moreover, the process by which a contract of lease passes into the

8. hands of an administrator as a part of the assets of the estate on the decease of the lessee is classed as a transfer by operation of law. It seems to be practically the universal rule that a transfer by operation of law in the absence of an express stipulation in that regard, is not within the provisions of the lease against assignment. 1 Tiffany, Landlord and Tenant 927, *et seq.*; 24 Cyc. 970; *Charles v. Byrd* (1888), 29 S. C. 544, 8 S. E. 1.

Appellant concedes the foregoing propositions, but contends in effect that such a transfer is prohibited by the lease. To us, however, it seems that appellant's coun-

9. sel in the process of proving his point is forced to assume it. There certainly is no express stipulation of the lease here prohibiting an assignment by operation of law. Neither do we believe that such a result may be accomplished by construction. The rule, as applied to re-

strictive covenants of leases on the subject of transfers, is thus stated: "Covenants against assignment or underletting are not favorably regarded by the courts, and are liberally construed in favor of the lessees, so as to prevent the restriction from extending any further than is necessary." Jones, Landlord and Tenant §464. "Restrictions of this character, upon alienation by the lessee, are not favored and are it is said, to be construed strictly, and a particular mode of alienation is, it has been stated in a leading case on the subject, not to be regarded as prohibited unless it is 'by words which admit of no other meaning.'" 1 Tiffany, Landlord and Tenant 921, citing *Crusoe v. Bugby* (1771), 3 Wils. 234, 2 W. Bl. 766. "They are construed with the utmost jealousy and very easy modes have always been countenanced for defeating them." *Riggs v. Purcell* (1876), 66 N. Y. 193. See, also, *Lake Erie, etc., R. Co. v. Marott* (1913), 52 Ind. App.

9. 332, 100 N. E. 865. We do not believe that by the application of these rules, any language of the lease here may be reasonably construed as prohibiting a transfer by operation of law. We call attention again that here the contest is not being waged by the lessor for the purpose of enforcing the covenant against assignment. It would seem that cases involving such a controversy are scarcely applicable here. For an instructive case of the latter kind, and a note in point, see *Gazlay v. Williams* (1908), 147 Fed. 678, 77 C. C. A. 662, 14 L. R. A. (N. S.) 1199. There is evidence to sustain the finding.

Appellee, by his claim, sought to recover, as indicated, four months rent at \$100 per month; \$50 paid real estate agents for their services in procuring the new tenant;

11. expenses alleged to have been necessarily incurred in making inside repairs, in order to procure such tenant, \$170.90; and expense of outside repairs, \$54. The court allowed the first three items, and disallowed the last. Appellant, in contending that the amount of recovery is

too large, directs the argument against only the third item, as to which it contends that the measure of damages cannot be made to cover permanent improvements to the real estate. It is not claimed that there was an absence of evidence to show that these repairs were reasonably necessary in order that a tenant might be procured. While it is true, that the repairs complained of were in the nature of permanent improvements, yet there is a provision of the lease that "the lessees agree to make all inside repairs." If reasonably necessary in order that a tenant might be procured, and hence reasonably necessary to the occupancy of the building, then it is not a violent presumption that the lessee here contemplated making such repairs at his own expense, when he accepted the lease. It has been held, under circumstances very similar to those presented here, that the lessor is not bound to rent the premises to other persons or to endeavor to do so, but that he may stand on his contract and recover the stipulated rent for the entire term. *Patterson v. Emerich* (1899), 21 Ind. App. 614, 52 N. E. 1012. However, it is advantageous to the defaulting lessee, for the lessor to procure other tenants, if possible, and thus reduce the amount of damages he may recover, and it would seem to be commendable for him to do so, and that the lessee or his representatives should not be heard to complain of his honest efforts to that end. *Alsup v. Banks*, *supra*. Here the repairs apparently were necessary in order to procure a tenant who would pay the same rent that the lessee agreed to pay. It would, therefore, seem proper to allow the lessor his reasonable expenses to that end. Expenses in making repairs were allowed as a part of the recovery in *Higgins v. Street* (1907), 19 Okl. 45, 92 Pac. 153, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086. An instructive note accompanies that case. See, also, 13 Cyc. 78; 24 Cyc. 923.

Under all the circumstances, we hold that the court did not err in allowing the expense of said repairs. Other

Terre Haute, etc., Traction Co. v. Hornaday—59 Ind. App. 207.

assignments in the motion for a new trial are waived, there being no point directed to them. Judgment affirmed.

NOTE.—Reported in 108 N. E. 605. As to covenants implied on part of landlord, see 32 Am. Dec. 355; 43 Am. Rep. 227. See, also, under (1, 2) 24 Cyc. 1050; (3) 18 Cyc. 212; (4) 9 Cyc. 631; (5) 24 Cyc. 1340; (6, 8) 18 Cyc. 312; (7) 24 Cyc. 1340, 970, 968; (9) 24 Cyc. 970; (10) 11 Cyc. 1077.

TERRE HAUTE, INDIANAPOLIS AND EASTERN TRAC- TION COMPANY v. HORNADAY.

[No. 8,622. Filed June 4, 1915.]

CARRIERS.—Ejecting Passenger.—Pleading.—Answer.—In a passenger's action for damages for being ejected from defendant's car, an answer admitting that plaintiff tendered a proper ticket which defendant accepted, and seeking to justify the ejectment on the ground that plaintiff was a through passenger, who sought to avoid paying the scheduled rate of fare by paying his fare in cash to a certain stop under pretense that such stop was his destination, and that on arrival at such stop he stepped from the car and immediately reentered it, and tendered the ticket which defendant's conductor accepted, at the same time demanding extra fare which plaintiff refused to pay, amounted to an argumentative denial, and the affirmative matter pleaded was provable under the general denial, so that there was no error in sustaining a demurrer thereto.

From Superior Court of Marion County (88,417); *Clar-
ence E. Weir*, Judge.

Action by Ernest Hornaday against the Terre Haute, Indianapolis and Eastern Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

W. H. Latta, for appellant.

Joseph W. Hutchinson, for appellee.

HOTTEL, J.—This is an appeal from a judgment recovered by appellee against appellant for \$100, damages on account of his alleged unlawful ejectment from one of appellant's cars. The complaint is in one paragraph and alleges among

other things, in substance, that appellant is organized under the laws of this State, and on September 24, 1912, owned and operated, among others, a railway extending from the terminal station at Indianapolis, hereinafter referred to as the "terminal station", to Lafayette, Indiana; that it is a common carrier of both passengers and freight; that less than ten miles north of the terminal station, on its line of railroad, appellant maintained a ticket office and station, known as Augusta; that all of appellant's local cars were scheduled to stop at Augusta and its terminal station; that less than ten days prior to September 24, 1912, appellee purchased a round-trip ticket from the terminal station to Augusta (here follows a copy of ticket); that such ticket was a valid ticket and entitled appellee to be carried on any of appellant's local cars from its terminal station to Augusta, and to be carried as a passenger from Augusta to its terminal station; that appellee was compelled to purchase said ticket or pay more for riding between such points; that on the date given appellee got on one of appellant's south bound local cars at Augusta with the intention of riding as a passenger thereon to the terminal station; that appellant's conductor in charge of such car came to appellee and collected from him the return coupon of said ticket; that the going coupon of said ticket had been torn off by one of appellant's conductors and accepted by him without objection in full payment of appellee's fare from the terminal station to Augusta on a previous occasion; that after the conductor had collected from appellee the return coupon he punched some holes in it and put it in his pocket and then said that he would have to have five cents extra; that appellee explained to him that he had just given him a good ticket from Augusta to Indianapolis, and that he was entitled to ride to the terminal station without paying any money; that the conductor said the rules of the company required that he collect five cents more and that he would have to collect it; that long before said car reached the

terminal station, said conductor, without any fault or negligence on appellee's part, negligently and wrongfully stopped said car and negligently and wrongfully ordered appellee to get off the same; that appellee was comfortably seated and surrounded by other passengers, and the conductor came to him and negligently and wrongfully pulled at appellee's clothing and ordered him to leave said car; that by reason of said negligent and wrongful acts of said conductor, appellee was compelled to get off said car to keep from being further wrongfully annoyed, humiliated and degraded by said conductor. (Here follow allegations of fact going to the question of damages).

To this complaint appellant filed a general denial and two paragraphs of affirmative answer. Each affirmative answer admits the formal averments of the complaint relative to appellant's corporate existence, business, etc., and then further avers that on September 24, 1912, there was a town on its line of railway known as Augusta, which was 9.55 miles from Indianapolis, and to and from which point appellant sold local and return-trip tickets; that the legal fare from Augusta to the city of Indianapolis was fifteen cents and the round-trip fare from Indianapolis to Augusta and return to Indianapolis was twenty-five cents; that appellee, prior to September 24, 1912, purchased at the city of Indianapolis a round-trip ticket, entitling him to ride from Indianapolis to Augusta and return, and used the going portion from Indianapolis to Augusta; that on the occasion in question appellee got upon one of appellant's south bound local cars at stop 10, which stop is alleged to be 4.5 miles north of Augusta, for the purpose and with the intention of riding and being transported upon said car to the city of Indianapolis; that appellant's conductor came to the appellee for his fare between said stop 10 and Augusta; that appellee concealed from said conductor his said intention of riding to the city of Indianapolis and

Terre Haute, etc., Traction Co. v. Hornaday—59 Ind. App. 207.

stated to the conductor that he desired to go to Augusta, and paid to said conductor ten cents as the fare from stop 10 to Augusta; that "it is averred in plaintiff's complaint that he got upon said car at Augusta for the purpose of being transported to the city of Indianapolis, but this defendant avers the true facts to be that when the said car reached Augusta, the plaintiff having at all times the intention and purpose of being transported on said car from said stop 10 to Indianapolis, and until that time concealing his said intention from said conductor and from this defendant, stepped from said car to the platform of the station of said town of Augusta and immediately stepped from said platform back upon said car and again took his place in said car with the intention aforesaid at all times to be a through passenger and be transported as such from said stop 10 to the city of Indianapolis. That this defendant then (at the time appellee tendered the return portion of his ticket) for the first time knowing and having reason to know that the said plaintiff desired and intended to be a through passenger from said stop 10 to the city of Indianapolis, then and there demanded that the plaintiff pay the through passage rate according to said schedule and tariffs, and said order of said railroad commission (which schedules and tariffs are set out in each of said answers) as a through passenger from stop 10 to the city of Indianapolis. That said plaintiff was in fact a through passenger from said stop 10 to the city of Indianapolis. That this defendant was required to collect from him according to said circular No. 88 (a copy of which is set out in each of said answers), the through fare from said stop 10 to Indianapolis, and not otherwise, and that any other fare would have been a discrimination as to other passengers upon said car; that the plaintiff never at any time intended to terminate his passage upon said car at Augusta; that the plaintiff was ejected from said car as aforesaid, and under the said circumstances and no others, for the reason

Terre Haute, etc., Traction Co. v. Hornaday—59 Ind. App. 207.

that he at all times refused to pay said through fare, and that the plaintiff did not at any time pay or offer to pay the correct, legal and lawful fare for his passage from said stop 10 to the city of Indianapolis."

Appellee demurred to each of said paragraphs for want of facts to constitute a defense to his complaint and accompanied each of such demurrers with a proper memorandum. Each of said demurrers was sustained and appellant excepted to such rulings, and went to trial on the issues formed by the complaint and answer in general denial. A trial by the court resulted in a finding and judgment for appellee. The only errors assigned are those challenging the ruling on the demurrers to each paragraph of affirmative answer.

It will be observed from the averments of such paragraphs, above indicated, that appellant admitted therein that appellee tendered and delivered to it a proper ticket which it accepted, entitling appellee to be conveyed from Augusta to its terminal station, and admits appellee's ejection from the car, and seeks to justify such ejection on the theory that appellee was on its car as a through passenger from stop 10 to its terminal station and refused to pay the proper fare between such points, as provided by appellant's schedule of tariffs and as required by order of the railroad commission. It is apparent therefore that the averments in such answers relative to appellant's schedule of rates and the order of the railroad commission expressed in its circular 88, upon which appellant seeks to justify its conduct in demanding the excess fare must necessarily depend on whether appellee was, in fact, a through passenger from stop 10, as alleged in such answer, or a passenger from Augusta, as alleged in the complaint. It follows, we think, that appellant, under its general denial was entitled to prove all the affirmative matter set out in his answer, and that such answer amounts to an argumentative denial and hence the rulings on such demurrers were harmless, /

Chicago, etc., R. Co. v. Leiter—59 Ind. App. 212.

It is further suggested by appellee that the specific averments of the answer show two separate independent contracts for passage over appellant's road, both actually consummated, viz., that appellee paid the regular fare from stop 10 to Augusta; that appellant received such fare and carried appellee to Augusta, where appellee alighted from the car and again took passage thereon to Indianapolis and tendered a proper ticket, theretofore purchased by him for passage to such point, and that such averments of fact necessarily control the general averment made by way of conclusion that appellee was a through passenger from stop 10, etc. This contention of appellee is supported by authority in other jurisdictions (see *Louisville, etc., R. Co. v. Klyman* [1902], 108 Tenn. 304, 67 S. W. 472, 91 Am. St. 755, 56 L. R. A. 769; *Phettiplace v. Northern Pac. R. Co.* [1893], 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483; *Chicago, etc., R. Co. v. Parks* [1857], 18 Ill. 460, 68 Am. Dec. 562) but inasmuch as a determination of such question is not necessary in this case we express no opinion thereon. Judgment affirmed.

NOTE.—Reported in 109 N. E. 189. See, also 31 Cyc. 303, 358; 6 Cyc. 1913 Anno. 565-new.

CHICAGO AND ERIE RAILROAD COMPANY v. LEITER.

[No. 8,612. Filed June 15, 1915.]

1. RAILROADS.—*Injuries to Animals on Tracks.—Negligence.—Wilful Injuries.—Evidence.*—Evidence showing that plaintiff's horses were kept in a field, securely fenced, from which they escaped and entered upon defendant's railroad track at a point where defendant had removed a cattle guard and highway wing fence, that the horses ran along the track in front of an approaching train and were overtaken at a bridge some distance from where they entered on the track, and that the engineer and fireman saw them and could have prevented the injury by stopping the train, but, instead of stopping it or slackening the speed, continued to blow the whistle and pursue the horses until the injuries

Chicago, etc., *R. Co. v. Leiter*—59 Ind. App. 212.

- occurred, not only tended to support a charge of negligence, but also tended to support the theory of wilful injury. pp. 214, 215.
2. **RAILROADS.—Injuries to Animals on Tracks.—Evidence.—Contributory Negligence.**—Where the evidence, in an action against a railroad company for damages for killing plaintiff's horses, showed that the horses were kept in a field surrounded by a substantial fence, and that the horses were not of a character such that contributory negligence could be imputed to plaintiff by reason of pasturing them in the field from which they escaped, liability of the defendant could not be avoided on the ground of contributory negligence. p. 215.
3. **ANIMALS.—Wilful Injuries.—Pleading.—Complaint.—Contributory Negligence.**—A complaint charging wilful injuries to animals need not aver that plaintiff was without fault, but is sufficient on that theory if the language shows that the defendant had an intent, either actual or constructive, to do the injury complained of. p. 215.
4. **RAILROADS.—Injuries to Animals on Tracks.—Negligence.—Wilful Injuries.—Evidence.**—Where the evidence showed that defendant's horses were seen on defendant's tracks by those in charge of its train in time to have slackened the speed, or to have stopped the train, so as to avoid the injuries, but that they failed to do so, and that such could have been done without peril to persons or property entrusted to defendant for transportation, it was for the jury to determine whether defendant was negligent, or whether it was liable for wilful injuries, so that a verdict for plaintiff was not without evidence to support it on either theory. p. 216.
5. **RAILROADS.—Injuries to Animals on Tracks.—Liability.—Negligent or Wilful Injuries.**—The liability of a railroad company for injuries to animals, alleged to have been either negligently or wilfully inflicted, is not affected by the rule that to recover under the statute the evidence must show actual contact with the animals. p. 216.
6. **RAILROADS.—Injuries to Animals on Tracks.—Damages.—Interest.**—In an action for damages for the loss of plaintiff's horses killed by defendant's train, where the evidence showed their value was \$650, a verdict for \$700 was not excessive in view of the fact that interest on the value of the horses was recoverable from the date of filing the complaint, which in separate paragraphs charged negligence and wilful injuries respectively, and the interest from that date to the returning of the verdict was more than \$50. p. 217.

From Cass Circuit Court; *John S. Lairy*, Judge.

Action by Levi Leiter against the Chicago and Erie Rail-

road Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William O. Johnson, Holman, Stephenson & Bryant, Long & Yarlott and M. A. Baker, for appellant.

C. C. Campbell and George W. Funk, for appellee.

IBACH, P. J.—This is an action for damages for the killing of appellee's horses by appellant on its railroad tracks.

The evidence in the case most favorable to appellee

1. shows that in the year 1906, appellant for some reason removed many of its cattle guards and highway fences, among which were those which had existed in close proximity to appellee's farm, and since that time has not rebuilt or maintained any of such crossings, but has maintained its lateral fences through appellee's farm. Four of appellee's horses escaped from a field which was securely fenced and entered on appellant's right of way at a point where some time prior thereto appellant had removed a cattle guard and highway wing fence, and at a time when one of appellant's trains was approaching the highway crossing and had given the usual highway crossing signals. The horses ran in front of the approaching train and were overtaken at appellant's bridge over Mud Creek some distance away from the crossing, where they had entered on the tracks. The engineer and fireman actually saw the horses running before the train and the signals given by appellee's wife, who was at the time on appellant's right of way, endeavoring to protect the horses from the oncoming train, and at such time the engine was being operated at such a rate of speed that the train could have been stopped in ample time to have prevented the collision with the horses and their consequent injury and death. The train, however, was not then stopped, neither was its speed checked, but instead the whistle was constantly blown and the horses pursued until by reason of the high embankments along the right of way, and the existence of a cattle guard at

Chicago, etc., *R. Co. v. Leiter*—59 Ind. App. 212.

the bridge, there was no escape for the horses, and they in their fright attempted to cross over the bridge, but fell through the trestle, and one was struck by the train and killed, another had to be killed because its leg was broken in falling through the trestle, and another died shortly afterwards from its injuries. There was evidence that the horses were worth \$650 and a verdict of \$700 was returned.

There is evidence to show that the fence surrounding the field in which the horses were confined was a substantial fence, and that the horses were not of a character

2. such that contributory negligence could be imputed to appellee by reason of the fact that he allowed them to feed and pasture in the field from which they escaped. Our courts have held many times that the owner of live stock is not to be charged with contributory negligence when there is evidence to show that the fences which he maintained were ordinarily and reasonably secure, and they escaped from the enclosure without his fault or knowledge, and entered on the lands of another, which rule applies to railroad companies. 1 Thornton, Negligence §§1222, 1223; *Dennis v. Louisville, etc., R. Co.* (1888), 116 Ind. 42, 18, N. E. 179, 1 L. R. A. 448; *Pittsburgh, etc., R. Co. v. Shaw* (1896), 15 Ind. App. 173, 43 N. E. 957. There is evidence not only tending to support the first paragraph of

1. complaint, which is based on the theory of negligence, but likewise to support the amended second paragraph, which is drawn on the theory of wilful injury.

In answer to one contention of appellant, it is proper to state at this point that a complaint to be good on the theory of wilful injury need not contain an averment that

3. plaintiff was without fault. *Chicago, etc., R. Co. v. Nash* (1891), 1 Ind. App. 298, 301, 302, 27 N. E. 564, and cases cited. In this case the court in effect decides that intention is the controlling element in wilful injury, and for a complaint to be good on that theory, the language used must be sufficient to show that the defendant had an

Chicago, etc., R. Co. v. Leiter—59 Ind. App. 212.

intent, either actual or constructive, to do the injury complained of, but it is not necessary to use words indicating an act amounting to a crime, or imputing actual malice toward the owner of the property injured, nor to show that plaintiff was free from contributory negligence, nor that the property injured was rightfully at the place of injury. The averments of the paragraph under consideration charging that the injurious act was purposely and intentionally committed with the intent wilfully and purposely to inflict the injury complained of, meets all requirements. See, *Indianapolis St. R. Co. v. Taylor* (1902), 158 Ind. 274, 13 N. E. 456; *Walker v. Wehking* (1902), 29 Ind. App. 62, 63 N. E. 128. The facts of this case sufficiently show

4. that the stock was seen on the tracks of the railroad company by those operating a train a sufficient length of time before the collision occurred to have slackened the speed of the train, or to have stopped it, without imperiling the persons or property entrusted to it for transportation. Under such a state of facts it was for the jury to determine whether negligence existed on the part of the appellant, or whether it was liable for the commission of a wilful injury, and having found for appellee, it is not for this court to say that there was no evidence to support such conclusion.

The contention on appellant's part that to recover under the statute the evidence must show actual contact with the animals is correct, but this proposition has no appli-

5. cation to the first and amended second paragraphs of complaint, based on negligence and wilful injury, respectively. 1 Thornton, Negligence §1207; *Campbell v. Indianapolis, etc., Traction Co.* (1906), 39 Ind. App. 66, 79 N. E. 223; *Toledo, etc., R. Co. v. Bergan* (1893), 9 Ind. App. 604, 37 N. E. 31; *Toledo, etc., R. Co. v. Milligan* (1876), 52 Ind. 505, 510.

The damages awarded by the jury are not necessarily excessive, in a case such as this. The verdict may have been

Eckhart v. Marion, etc., Traction Co.—59 Ind. App. 217.

based on either the first paragraph of complaint, or

6. the amended second, in which event interest was recoverable from the time of filing complaint to return of the verdict, and since there was evidence to show the value of the horses was \$650, and the interest on that sum from the date of filing complaint to the returning the verdict was more than \$50, the damages given by the jury can not be said to be excessive.

Other errors are assigned, but what has already been said disposes of all of them adversely to appellant's contention.

The cause seems to have been fairly tried, and a correct result reached. Judgment affirmed.

NOTE.—Reported in 100 N. E. 213. As to the duty of railroad company to animals on track, see 20 Am. St. 161. As to interest on damages for injuries to stock, see 18 L. R. A. 450; 28 L. R. A. (N. S.) 68. As to the liability of a street railway for injuries to animal running at large, see Ann. Cas. 1913 C 722. See, also, under (1) 33 Cyc. 1297; 33 Cyc. 1915 Anno. 1299-new; (2) 33 Cyc. 1298; (3) 3 C. J. 160; 2 Cyc. 422; (4) 33 Cyc. 1304, 1303; (5) 33 Cyc. 1292; (6) 13 Cyc. 88.

ECKHART V. MARION, BLUFFTON AND EASTERN TRACTION COMPANY.

[No. 8,615. Filed June 16, 1915.]

1. *APPEAL.—Assignment of Errors.—Questions Presented.*—No question is presented for review by an assignment that the court erred in rendering judgment, since ordinarily the rendering of judgment is not in itself a ruling but is dependent on some prior ruling or succession of rulings, and it can not be ascertained from such an assignment what particular ruling it is desired to challenge. p. 220.
2. *APPEAL.—Assignment of Errors.—Sufficiency.*—An assignment that "the court erred in awarding judgment to the appellee on the answers to the interrogatories propounded to the jury trying this cause notwithstanding the general verdict", though irregular in form and not to be commended as a model, referred to a single action of the court and left no doubt as to the identity of the ruling intended to be presented for review, and was

Eckhart v. Marion, etc., Traction Co.—59 Ind. App. 217.

therefore sufficient to present the question of error in sustaining the motion for judgment *non obstante*. pp. 220, 221.

3. APPEAL.—*Assignment of Errors*.—*Requisites*.—An assignment of error to be sufficient should specify with reasonable certainty the ruling to be reviewed. p. 221.
4. RAILROADS.—*Injuries to Persons on Tracks*.—*Negligence*.—*Answers to Interrogatories*.—*Contributory Negligence*.—In an action against an interurban railroad company for injuries sustained by plaintiff, a woman of mature years, while waiting for the car to stop, where the complaint alleged that plaintiff attempted to halt the car at a rural stop before daylight in the morning, and charged negligence in operating the car without a headlight and at an excessive speed, and alleged that it did not stop and that in passing plaintiff's cloak was caught on the car and she was thrown to the ground, etc., but failed to allege any facts to show that her signals were seen, or to justify her in the belief that the car was going to stop, it must be assumed that the signals were not seen by the motorman and that plaintiff was not warranted in believing that the car would stop; hence on answers by the jury to interrogatories showing that she stood from 18 inches to two feet from the ends of the ties as the car passed, and that there was nothing to prevent her from standing at a safe distance, and that as the car passed her coat was caught and she was thrown, etc., plaintiff was chargeable with contributory negligence as a matter of law. pp. 221, 222, 225.
5. APPEAL.—*Review*.—*Answers to Interrogatories*.—*Complaint*.—In determining the sufficiency of the jury's answers to interrogatories to support a judgment thereon notwithstanding the general verdict, allegations in the complaint not covered by such answers must be considered as established by the proof and arrayed in support of the general verdict, and statements of conclusions therein should be treated as eliminated. p. 222.
6. NEGLIGENCE.—*Contributory Negligence*.—*Knowledge of Danger*.—It is a matter of common knowledge that a physical body of considerable magnitude moving rapidly agitates the air and creates in its wake a suction which tends to draw other physical bodies towards it; hence a woman of mature years was chargeable with knowledge of the fact that if she stood at the side of the track within 18 inches to two feet from the ends of the ties while a rapidly moving interurban car was passing, she was in a place of danger. p. 225.

From Jay Circuit Court; *James J. Moran*, Judge.

Action by Clara Eckhart against the Marion, Bluffton and Eastern Traction Company. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

Eckhart v. Marion, etc., Traction Co.—59 Ind. App. 217.

A. L. Sharpe and Frank W. Gordon, for appellant.

Jacob F. Denney, Abram Simmons and Frank C. Dailey, for appellee.

CALDWELL, J.—Appellant, a mature woman, brought this action to recover for personal injuries inflicted on her by one of appellee's cars at a flag station in Wells County. The averments of the complaint material to a determination of the questions involved are in substance that on January 1, 1907, appellee was operating a traction line between Marion and Bluffton; that on said day early in the morning, and before daylight, appellant went to stop 11 on said line near which she lived, for the purpose of taking passage to Bluffton on one of appellee's cars; that cars stopped at that place for the purpose of receiving passengers only on signal from such passengers to that end; that soon after she reached the stop, and while it was yet dark the car approached; that "said car was not provided with a headlight as it should have been, and she signalled said car to stop that she might embark thereon, and that after signalling said car to stop, she stepped aside from the usual stopping place of the company's cars where they made stops at said station, and where she was out of the way of said cars when they did stop at their usual stopping place at said station, believing, as she had a right to believe, that said car would stop at said station and let her embark thereon; that the car which she had so signalled did not stop at said station * * * but * * * ran by her at a very high rate of speed, and * * * caused her cloak which she was then wearing * * * to be drawn towards said car, and through no fault of plaintiff, but due entirely to the high rate of speed at which defendant's servant was driving said car and the negligence of said servant to stop said car where he properly should, her cloak was caught by some part of said car as the same went swiftly by her", and she was thereby thrown to the ground and injured; "that had said car been

approaching until it arrived and she was injured, and during all the time it was running that distance, she knew it was approaching. Although she did not actually see the car on account of the fog and the darkness, until it was within 150 feet of the stop, she rose when it was twenty rods distant, and standing in the center of the track attempted to flag it by the use of her handkerchief. Standing in such position she continued to attempt to flag the car, using no light and no other device but her handkerchief, until it had approached to within 150 feet of the stop, whereupon she ceased her efforts to flag it, and stepped from the track to the south taking a position eighteen inches to two feet south of the south line of the ties of the track, which position she continued to occupy, facing north and in no other direction until she was injured. She chose her own position, and there was nothing to prevent her from standing at a safe distance from the track as the car approached and passed, or to prevent her from standing anywhere she chose in said highway at the time of her injury and theretofore. If appellant had stood at a distance of four or more feet from the track as the car passed she would not have been injured, and there was nothing to prevent her from standing at such distance. The car did not brush against her or strike her, but while she was standing at the place aforesaid, in which place she stood continuously after she stepped from the track, she was wearing a long coat entirely unbuttoned and as the car passed the coat was blown or pulled against the car and caught on some part of it on the south side near the rear end, and she was thereby thrown and injured.

In determining whether the court properly overthrew the general verdict by rendering judgment on the answers to the interrogatories, there are certain allegations of

5. the complaint not specifically covered by the answers that must be considered. The substance of such
4. allegations, if properly pleaded, must be deemed to be established by proof, and should be arrayed in

Eckhart v. Maricn, etc., Traction Co.—59 Ind. App. 217.

support of the general verdict, if thereby it may be upheld. *Wabash R. Co. v. McNown* (1913), 53 Ind. App. 116, 99 N. E. 126, 100 N. E. 383. First, however, there are certain statements contained in the complaint that should be eliminated. Thus, the allegation that the car was running at a very high rate of speed states a conclusion rather than a fact, and does not strengthen the complaint. The averment that appellant believed, and had a right to believe that the car would stop is of a like nature. It was specifically averred in substance that cars stopped at this particular station only on signal. It is alleged that appellant signalled the car to stop, but there is no averment as to when or under what circumstances, except as to the darkness and the fog, the signal was given, or at what distance from the car or as to the nature of the signal, or whether it was such as could be seen in the darkness, or that the motorman saw it, or that appellant believed he saw it. There is, therefore, no fact or set of facts averred justifying the allegation that appellant believed or that she had reason to believe that the car would stop. It should be presumed that appellant by direct averments or allegations justifying inferences to that end stated her cause of action as strongly as the facts warrant. The case will therefore be further considered on the assumption that the motorman did not see the signal, and that appellant was not justified in entertaining a belief that the car would stop. The averment that the car had no headlights states a fact, and must be added to the other facts found by the jury. The subject of the allegation that appellant's injury was "due to the high rate of speed at which said car was so negligently driven" and to "the further fact that said car was so negligently driven in the nighttime without being provided with a headlight or other device by which the motorman in charge of said car would see persons who gave him signals to stop" is proximate cause rather than negligence. However, under the principles announced by *Domestic Block Coal Co. v. DeArmev* (1913),

Eckhart v. Marion, etc., Traction Co.—59 Ind. App. 217.

179 Ind. 592, 100 N. E. 675, 102 N. E. 99; and *Kahle v. Crown Oil Co.* (1913), 180 Ind. 131, 100 N. E. 681, and cases following those decisions, said averments are probably sufficient as charges of negligence as well as proximate cause. We shall therefore consider the case on the assumption that negligence is sufficiently charged not only respecting the absence of a headlight, but also the rate of speed. See, also, *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1915), 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739.

The situation then is as follows: Appellant, a mature woman, accustomed to travel by interurban, and familiar with the surroundings, stood in the middle of the track and attempted to flag a car which she heard approaching, using as a signal only her handkerchief. She first saw the car when distant 150 feet, negligently running in the darkness at a high rate of speed without any headlight, and thereupon immediately ceased her signals, and stepped from the track to a position eighteen inches to two feet from the ends of the ties, which position she maintained until injured. She chose her own place, and there was nothing to prevent her from taking a safe position further from the track. She had no knowledge and there was nothing to indicate that her signals had been seen, or that the car would slacken its speed or stop. She was wearing a long cloak unbuttoned. The car approached, reached her and passed at such speed, but appellant did not change her position. If she had stood at a distance four feet or more from the track she would not have been hurt. As the car passed, her coat was blown against it and caught on some part of it near the rear end, and she was thereby thrown and injured.

Under such circumstances, Can the court say as matter of law that appellant was guilty of negligence which proximately contributed to her injury? Ordinarily contributory negligence is a question for the jury. The facts here are undisputed. If but one inference may reasonably be drawn from them, the situation calls for the exercise of the powers

Eckhart v. Marion, etc., Traction Co.—59 Ind. App. 217.

of the court. Assuming the other facts to remain stable, if appellant, for the purposes of the discussion, should be assigned to various positions differing in their remoteness from the track, in some of such positions she would plainly be adjudged guilty of contributory negligence as matter of law, as if she had voluntarily and knowingly stood just outside the rail. In other positions more remote, a question of fact for the jury would be presented. Proceeding

to determine the matter as appellant was actually

6. situated under the finding, the fact is generally known that a physical body of considerable magnitude moving rapidly agitates the air and creates in its

4. wake a suction which tends to draw other physical bodies towards it. A woman of mature years under

ordinary circumstances should be chargeable with knowledge of this fact, because it is a matter of common knowledge. Considering that the car overhangs the rail, appellant was standing very close to it. The fact that her coat was caught by the car indicates her proximity to it. She maintained her position after she must have known definitely that the car would not be stopped. As the car approached very near her, she must have observed definitely that it was moving rapidly, and that there was no slackening of its speed, but she maintained her position close to the track when a step backward would have saved her. By way of analogy, the end of a street or interurban car necessarily swings out a distance from the track as the car rounds a curve. This being a well known fact, the courts hold that a person standing near the track who is injured by such swinging end coming in contact with him is guilty of contributory negligence, in that he fails to observe the plain and simple precaution of stepping back. *Matulewicz v. Metropolitan St. R. Co.* (1905), 107 App. Div. 230, 95 N. Y. Supp. 7; *Garvey v. Rhode Island Co.* (1904), 26 R. I. 80, 58 Atl. 456; *Jelly v. North Jersey St. R. Co.* (1908),

Eckhart v. Marion, etc., Traction Co.—59 Ind. App. 217.

76 N. J. L. 191, 68 Atl. 1091; *South Covington, etc., R. Co. v. Besse* (1908), 16 L. R. A. (N. S.) 890, note.

There is a like holding in a case where a person was standing so close to the track that he was injured as a car passed, by coming in contact with a passenger whom he knew to be riding on the steps of the car. *Graves v. Tacoma R., etc., Co.* (1913), 72 Wash. 387, 130 Pac. 476, 45 L. R. A. (N. S.) 269. Also where a person standing near the track leaned forward in the act of signalling an approaching car, so that it came in contact with some portion of his body as it passed. *Neal v. Springfield St. R. Co.* (1905), 189 Mass. 351, 75 N. E. 702; *Norfolk, etc., Traction Co. v. White* (1909), 109 Va. 172, 63 S. E. 418. Also where a woman, standing near the track waiting for an approaching car, observed the front end pass without injuring her, and therefore believed she was far enough from the track to be safe, but was struck by the rear handhold as the car turned the curve. *Widmer v. West End St. R. Co.* (1893), 158 Mass. 49, 32 N. E. 899.

The cases cited are illustrative rather than decisive of the question here. A point of similarity exists between those first cited and the case at bar in that each involves the principle of charging a person of maturity and under ordinary circumstances with knowledge of facts within the scope of common observation. *Bruff v. Illinois Cent. R. Co.* (1909), 121 S. W. (Ky.) 475; 24 L. R. A. (N. S.) 740, is in some particulars, closely parallel with the case at bar. There plaintiff, after an unsuccessful attempt to flag an approaching train at night, stepped from the track as it neared him, whereupon the suction of the train in passing blew off his hat. In an involuntary attempt to catch his hat, his hand came in contact with the train, thereby breaking his arm. It was held that plaintiff was guilty of contributory negligence in unnecessarily taking a position so near the track. In the case at bar, it does not appear to us that reasonable minds would differ on the proposition that appellant failed to exercise ordinary care for her own

safety, and that her own negligence contributed proximately to her injury. After she ceased to signal the car, while it was yet 150 feet distant, there was apparently no excuse for her standing in such close proximity to the track. Common prudence should have suggested to her that she take a position more remote. The court did not err in sustaining appellee's motion for judgment. See also *Kelly v. Boston Elevated R. Co.* (1908), 197 Mass. 420, 83 N. E. 865, 15 L. R. A. (N. S.) 282, note; *Southern R. Co. v. Bailey* (1910), 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379.

Judgment affirmed.

Moran, J., not participating.

NOTE.—Reported in 109 N. E. 224. As to who are passengers and when they become such, see 61 Am. St. 75. See, also, under (1, 2) 3 C. J. 1385; 2 Cyc. 997; (3) 3 C. J. 1357; 2 Cyc. 987; (4) 6 Cyc. 626, 642; (5) 38 Cyc. 1027; (6) 29 Cyc. 513.

LITTLE ET AL. v. MUNDELL ET AL.

[No. 8,632. Filed June 16, 1915.]

1. ATTACHMENT.—*Liens.—Priority.—Rights of Creditors Filing Under.*—The lien on property attached relates back to the time the writ of attachment was placed in the hands of the sheriff, and the claims of all attaching creditors, including those who have properly filed under, are liens from the time the original writ was placed in the hands of such officer, and take priority over subsequent judgments and mortgages, and this is so even though the underfiled claims were not in fact filed until after such mortgage was executed or judgment rendered. p. 232.
2. ATTACHMENT.—*Filing Under.—Rights Acquired.*—Creditors may file under an original attachment proceeding as long as the same remains pending, and such underfiling claimants acquire the same lien and become entitled to all the rights of the original plaintiff. p. 233.
3. ATTACHMENT.—*Filing Under.—Effect.—Dismissal of Original Action.*—While the claim or complaint of each underfiling creditor is in a sense an independent action, it keeps alive the original writ of attachment and the levy made thereunder, even though there is a dismissal by the first attaching creditor. p. 233.
4. ATTACHMENT.—*Filing Under.—Dismissal of Original Action.—Conveyance by Debtor.—Subsequent Sale to Satisfy Attachment*

Lien.—Rights of Debtor's Wife.—Although the wife of a debtor whose real estate has been levied on under a writ of attachment is entitled to one-third of such real estate as against the purchaser at a sale to satisfy the lien, where a debtor and his wife conveyed his real estate after the original writ of attachment had been levied thereon, and after a number of creditors had filed under in the original action, and then procured a dismissal of the original action, the liens of the creditors filing under had attached and were not affected by such dismissal, and the act of the wife in joining her husband in such conveyance was a waiver of her right to assert a one-third interest in the land as against the purchasers at a sale subsequently had to satisfy the liens of the creditors filing under. pp. 233, 235, 236.

5. *APPEAL.—Review.—Findings.—Conclusiveness.*—For the purpose of determining the question raised by the exceptions to conclusions of law the finding of facts must be accepted as correct, hence the contention by appellant who was the wife of defendant in an attachment proceeding, that a conveyance of the land in which she joined, and which was made after the lien had attached but before sale, was a nullity and the result of mutual mistake, etc., can not prevail where the findings do not support the contention that the deed was void and do not show any rescission or cancellation, but rather that there was a ratification thereof. p. 234.

6. *HUSBAND AND WIFE.—Conveyances.—Inchoate Interest of Wife.*—A wife, by joining her husband in a valid and effective deed extinguishes her inchoate interest in the land conveyed. p. 236.

From Hamilton Circuit Court; *Dan Waugh*, Special Judge.

Action by Vern T. Mundell against John Mundell and others to foreclose a mortgage, in which John H. Little and Hannah E. Little, his wife, and certain attachment creditors of John H. Little filed cross-complaints asserting title in themselves respectively to the land involved. From the judgment rendered, Hannah E. Little and others appeal. *Affirmed.*

Joseph A. Roberts and *Shirts & Fertig*, for appellants.
Kane & Kane, for appellees.

HOTTEL, J.—The facts controlling the questions presented by this appeal, as found by the trial court, are in substance

as follows: On June 13, 1907, John H. Little was the owner in fee of a 40-acre tract and a 7-acre tract of real estate in Hamilton County, Indiana. On that day he and his wife, Hannah E. Little, one of the appellants, joined in the execution of a mortgage on said real estate to the Wainwright Trust Company to secure a note of \$1,500, and interest notes, all executed by John H. Little. This mortgage was recorded, and on August 12, 1910, was assigned of record to appellee, Vern T. Mundell. John H. Little moved out of the State of Indiana, and on September 21, 1908, Zola Walker and others filed suit against him in the Hamilton Circuit Court on a note executed by him, and in connection with such suit a writ of attachment was caused to be issued against his property. This writ was levied on said 40-acre tract of real estate on September 23, 1908, and the proper *lis pendens* notice filed and due return of the levy made by the sheriff and recorded with the clerk, all on the same day. On April 14, 1909, the Peoples State Bank of Indianapolis filed under in the suit of Zola Walker. On August 13, 1909, John H. Little and his wife, Hannah E. Little joining, conveyed by warranty deed said entire forty-seven acres to John Mundell, the brother of Vern T. Mundell for the sum of \$4,230, which sum was paid on the same day as follows: \$1,600 by check to John H. Little, \$257 to Zola Walker, *et al.*, in discharge of their original claim on which the writ of attachment issued, \$124.05 to the mother of John Mundell on a debt owed to her by said Little, \$2 attorney fees for said Little, and \$50.45 accrued interest on said mortgage, \$1,500 by assuming payment of the mortgage, the remainder being covered by a note given by John Mundell to Little. On the same day this deed was made Zola Walker, and the other plaintiffs to the original attachment proceeding, dismissed their complaint. On August 28, 1909, the Knight & Jillson Company filed under in said cause No. 14,884, its complaint on note against John H. Little, which complaint was accompanied with approved

bond and affidavit for attachment. On March 15, 1910, the Peoples State Bank of Indianapolis and the Knight & Jillson Company amended their underfiled complaints in cause No. 14,884, making John Mundell a defendant there-to and alleging therein that the conveyance to him from the Littles was fraudulent and asking that the attachment lien be adjudged prior to any rights acquired by said Mundell under his deed. Service of summons was had on Mundell and he appeared and answered such complaint. On April 25, 1910, cause No. 14,884 was tried by the court and the court found and adjudged that there was due from Little to the bank, \$4,568.16 and to the Knight & Jillson Company, \$9,136.32, without relief, etc., and adjudged that the attachment proceedings of such under-filing plaintiffs be sustained and decreed the sale of the said 40-acre tract of real estate as lands are sold on execution and adjudged that the proceeds of such sale be applied to the discharge of said sums found due said underfiling plaintiffs, but refused to adjudge that the deed to Mundell to said real estate be set aside and declared void.

The appellant Hannah E. Little was not a party to suit No. 14,884, nor to either of the complaints underfiled therein.

On May 21, 1910, an execution was issued to the sheriff for the sale of the forty acres under the attachment decree. The sale was duly advertised and the real estate sold to the bank and the Knight & Jillson Company for \$3,500. On July 22, 1911, the year having expired and there being no redemption the sheriff executed a deed to such purchasers for said 40-acre tract, which is all the security they have for their claims against John H. Little, he being insolvent.

On September 9, 1910, Vern T. Mundell, without any consideration, and for the purpose of assisting his brother, John, in getting as much as possible out of the forty acres covered by his (Vern's) mortgage, executed a release of the lien of the 7-acre tract covered by such mortgage, and

on September 28, he began this action to foreclose his mortgage on the forty acres.

At the time of the execution of the deed from the Littles to John Mundell, neither Little nor Mundell had any actual knowledge that the claim of the bank had been filed under in cause No. 14,884, but the same had in fact been so filed with affidavit in attachment and bond as aforesaid in open court, and the sheriff's notice of levy of attachment appeared of record in the clerk's office as provided by law.

On September —, 1909, said John Mundell, having learned of the attachment liens on the forty acres, went to the state of Mississippi, met said John H. Little, and made demand on him for the return of the purchase money; that Little returned to Mundell \$1,300 in cash, and in October, 1910, surrendered the purchase money note, which cash and note were to be held by Mundell until said litigation was disposed of and the title to said real estate made good in Mundell; that Little had paid out \$300 of the cash payment on his individual debts and did not agree to pay Mundell the amount of the note which he, Mundell, had paid to his mother, as part of the purchase price, nor did he repay to Mundell said \$300, nor said \$257 paid to Walker, *et al.*, nor did he agree to protect Mundell against his assumption of said mortgage, nor did Mundell then agree to reconvey said lands to John H. Little, but was to retain the possession and title to all of said real estate; that at the time the 7-acre tract was released from the mortgage and at the time of the finding it was worth \$1,200; that the forty acres at the time of the sheriff's sale was worth \$3,600 and at date of the finding not more than \$4,000; that there was due on the note sued on for principal, interest and attorney fees \$1,812.27, and that there should be credited thereon \$1,200, the value of the seven acres so released; that Mundell never returned to Little the \$1,300 repaid by him; that Mundell destroyed the said purchase-money note, sur-

rendered to him by said Little, and on June 24, 1911, executed to said John H. Little a quitclaim deed for said 40-acre tract which has not been recorded; that he still holds the seven acres claiming title in fee under said deed to him from Little and wife; and that the undivided two-thirds of said 40-acre tract largely exceeds in value the amount due on plaintiff's mortgage, including interest and costs.

On the above finding the court stated its conclusions of law as follows: "(1) That Vern T. Mundell is entitled to personal judgment against John Mundell for \$1,812.27, and that as to Peoples State Bank and Knight & Jillson Company they are entitled to have credit thereon for \$1,200. (2) That for the balance, to wit, \$612.27, Vern T. Mundell is entitled to foreclosure on the forty acres and to have same sold for the payment thereof. (3) That Hannah E. Little take nothing by her cross-complaint. (4) That Hannah E. and John H. Little have no interest in the forty acres. (5) That Knight & Jillson Company and the Peoples State Bank of Indianapolis are the owners in fee of the forty acres, subject to plaintiff's right to foreclosure for \$612.27."

Appellant Hannah E. Little, alone, assigns error, and therein separately challenges the correctness of the third, fourth and fifth conclusions of law, respectively.

One and the same question is presented by these separate assigned errors, viz., Under the facts found by the court, is Hannah E. Little entitled to one-third of the 40-acre tract of real estate in controversy, or, in other words, did the sale of said real estate under the attachment proceedings against John H. Little vest in his wife Hannah E. Little a one-third of such real estate?

As affecting this question the following propositions of law are pertinent and applicable. The lien on prop-

1. erty attached relates back to the time the writ of attachment was placed in the hands of the sheriff, and

the claims of all the attaching creditors, including those who have properly filed under, are liens from the time the original writ was placed in the hands of such officer, and take priority over judgments rendered or mortgages executed afterwards, and this is so even though the underfiled claims were not in fact filed until after such mortgage was executed or judgment rendered. §§956, 978 Burns 1914, §§922, 943 R. S. 1881; *Shirk v. Wilson* (1859), 13 Ind. 129; *Ryan v. Burkam* (1873), 42 Ind. 507; *Fee v. Moore* (1881), 74 Ind. 319; *Taylor v. Elliott* (1875), 51 Ind. 375. Creditors may file under the original at-

2. tachment proceeding as long as the same remains pending, and such underfiling claimants acquire the same lien and become entitled to all the rights of the original plaintiff. See cases cited, *supra*. The claim or complaint of each underfiling creditor, though, in

3. a sense, an independent action, keeps alive the original writ of attachment and the levy made thereunder, and this is so even though there be a dismissal by the first attaching creditor. *Henderson v. Bliss* (1856), 8 Ind. 100; *Lexington, etc., R. Co. v. Ford Plate Glass Co.* (1882), 84 Ind. 516; *McLain v. Draper* (1887), 109 Ind. 556, 8 N. E. 910.

It follows from the propositions above announced that the lien of the bank and the Knight & Jillson Company on the real estate in question attached while the legal

4. title thereto still remained in John H. Little, and before he and his wife joined in the deed to John Mundell. The attachment was against the property of John H. Little and the real estate was sold to pay his debts. The lien was against the whole of the 40-acre tract and if the sale to satisfy such lien had been made while the legal title remained in John H. Little his wife unquestionably would have been entitled to one-third of such real estate as against a purchaser at such sale, or any one claiming through such purchaser.

The question therefore which we must determine, is: Did the appellant Hannah E. Little by joining her husband in conveying such real estate, after the lien of the bank and the Knight & Jillson Company had attached thereto, thereby waive or deprive herself of her right to assert her one-third interest in such real estate? It is very earnestly

5. contended by appellant, in effect, that such deed was a nullity; that it was the result of the mutual mistake and misunderstanding of both grantors and grantee, and that as soon as they became aware of the facts they rescinded and cancelled such deed; that the title to such real estate never passed to said Mundell but in fact always was in Little, and that the real estate was so sold, and hence, that the wife's interest can not be affected by such deed. This contention of appellant is not supported by the finding of facts, and for the purposes of the question under consideration, the finding of facts must be accepted as correct. *Kline v. Dowling* (1911), 176 Ind. 521, 96 N. E. 579; *Myers v. Reynolds* (1911), 47 Ind. App. 233, 94 N. E. 345; *Timmonds v. Taylor* (1911), 48 Ind. App. 531, 96 N. E. 331. Under the findings there can be no doubt as to the validity of the sale to Mundell by Little, and hence no question as to the validity of the deed made thereunder.

To us, it seems equally certain from the finding of facts that there was no rescission or cancellation of this deed on account of any mutual mistake of the grantors and grantee; but on the contrary, after both parties were in possession of all the facts there was a ratification of such sale and deed to the extent that Mundell was permitted to retain the title conveyed by such deeds pending the litigation affecting such title, Little turning back to him his note and part of the purchase money which Mundell was to hold "*until such litigation was disposed of and the title made good in Mundell*". (Our italics.) John Mundell still retains the 7-acre tract so deeded to him, and his brother, before beginning this foreclosure proceeding, released the

lien of his mortgage on such tract. The findings also show that in the attachment proceeding, John Mundell was made a defendant to the complaints of the bank and the Knight & Jillson Company and the court in that case refused to set aside the deed from Little to said Mundell, but simply declared that the liens of the bank and Knight & Jillson Company had priority over Mundell's conveyance.

It is, however, further insisted by appellant that the land was levied on as Little's land and sold and conveyed as his land; that the legal title thereto had in fact

4. been restored to Little when the bank and Knight & Jillson Company received their deed, and hence that they must of necessity claim title through Little, and are, for this reason, estopped from denying the title of Little's wife to the one-third which the statute gives her in his lands in such cases. As supporting this contention appellant cites cases brought by creditors to set aside a fraudulent conveyance, joined in by the wife. In such cases the courts have held that the wife is entitled to her third in the real estate so conveyed as against her husband's creditors on the theory that if such deed must fail and be held invalid as between the husband and such creditors that the same deed must likewise remain invalid and ineffective as against the wife. This conclusion necessarily follows. Such cases, however, are easily distinguishable from the instant case. In those cases a deed by which the wife extinguished her right made before the creditor's lien attached was held invalid and hence her right was restored. The deed which extinguished her right being destroyed could not stand in the way of her asserting her right, while in the instant case she, after the creditors' lien attaches to all of her husband's land, and, while she has the inchoate right therein which the statute gives her, voluntarily surrenders and conveys such right by joining her husband in a deed to such real estate, valid for all purposes both as to her husband and herself. There can be no doubt but

Little v. Mundell—59 Ind. App. 227.

that a wife, by joining her husband in a valid and
6. effective deed, may extinguish her inchoate interest
in his land. *Hudson v. Evans* (1882), 81 Ind. 596;
Sharts v. Holloway (1898), 150 Ind. 403, 50 N. E. 386.

Appellants insist in effect that appellees are forced to the
absurd position of claiming that they obtained the two-
thirds of the land in question because John H. Little

4. was the owner of the land when the lien attached,
and that they get the one-third of the same land
because he did not own the land but had sold it to another.
The answer to this contention is that the lien of the bank
and Knight & Jillson Company attached while the legal
title to the real estate was in John H. Little. After the
lien attached, and before the sale, appellant Hannah E. Little
by her voluntary deed surrendered and extinguished the pos-
sible or inchoate interest which she then had in such land,
and which but for such deed she might have effectually assert-
ed. While the title to the real estate in question was in her
husband at the time appellees' lien attached, it was not in
him at the time of the sale of such real estate. It follows,
we think, that the case is controlled by the cases of *Hud-
son v. Evans*, *supra*, and *Sharts v. Holloway*, *supra*, and
under the rule announced in those cases, she, by joining her
husband in his deed to such real estate, waived, "or barred
the possibility" of her inchoate right becoming a vested
right upon the judicial sale of such real estate. The judg-
ment is therefore affirmed.

NOTE.—Reported in 109 N. E. 227. As to vendor's right upon re-
scission, see 12 Am. Dec. 312. As to wife's right to dower in lands
sold under execution against husband, see 18 L. R. A. 78. As to
attachment lien not perfected by judgment during husband's life-
time as prior to widow's share in estate, see Ann. Cas. 1913 A 343.
See, also, under (1) 4 Cyc. 623; (2) 4 Cyc. 644; (3) 4 Cyc. 809;
(4) 14 Cyc. 957, 928; (5) 38 Cyc. 1090; (6) 14 Cyc. 953.

City of Jeffersonville v. Louisville, etc., Traction Co.—59 Ind. App. 237.

CITY OF JEFFERSONVILLE v. LOUISVILLE AND SOUTHERN INDIANA TRACTION COMPANY.

[No. 8,498. Filed February 18, 1915. Rehearing denied April 20, 1915. Transfer denied June 17, 1915.]

1. **MUNICIPAL CORPORATIONS.—Public Improvements.—Streets.—Statutory Provisions.**—While §§8655, 8710-8721 Burns 1914, Acts 1905 p. 219, Acts 1909 p. 412, Acts 1907 pp. 167, 550, provide a method for improving the streets of a city and for collecting the cost thereof, such provisions are not exclusive, and a city may improve its streets by virtue of §8961 Burns 1914, Acts 1905 p. 383, which gives to cities exclusive power over streets and alleys "to extend * * * and otherwise improve those already laid out, or that may be hereafter laid out". p. 240.
2. **MUNICIPAL CORPORATIONS.—Public Improvements.—Streets.—Statutory Provisions.**—Sections 8710-8721 Burns 1914, Acts 1909 p. 412, Acts 1907 pp. 167, 550, relating to the improvement of streets, apply only where it is sought to make the improvements at the expense of the abutting property owners. p. 241.
3. **MUNICIPAL CORPORATIONS.—Public Improvements.—Streets.—Liability of Street Railroad Company.—Complaint.**—A complaint against a street railroad company to collect the cost of improving that portion of a street occupied by its tracks, alleging that defendant was operating under a franchise ordinance providing that it should pay the cost of improvement of all that part of any street within its tracks, etc., and averring the adoption of a resolution for the making of such improvement and for assessing to the company the cost of that part of the improvement within its tracks, etc., though disclosing that the improvement was not pursuant to §§8655, 8710-8721 Burns 1914, Acts 1905 p. 219, Acts 1909 p. 412, Acts 1907 pp. 167, 550, disclosed a valid subsisting contract between the city and the defendant pursuant to which the improvement was made in that part of the street occupied by the tracks, and for the cost of which the city was entitled to recover. pp. 241, 242.
4. **MUNICIPAL CORPORATIONS.—Public Improvements.—Streets.—Statutory Provisions.**—Where a city attempts to improve a street pursuant to §§8655, 8710-8721 Burns 1914, Acts 1905 p. 219, Acts 1909 p. 412, Acts 1907 pp. 167, 550, providing for making such improvements at the expense of the abutting property owners, there must be a strict compliance with such provisions. p. 242.

From Floyd Circuit Court; *William C. Utz*, Judge.

Action by the City of Jeffersonville against the Louisville

City of Jeffersonville v. Louisville, etc., Traction Co.—59 Ind. App. 237.

and Southern Indiana Traction Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

George H. Hester and *James W. Fortune*, for appellant.

George H. Voigt and *Stotsenburg & Weathers*, for appellee.

IBACH, J.—Appellant sought by this action to recover from appellee \$639.32 for improving so much of certain streets as was occupied by appellee's tracks, pursuant to certain contractual relations between the parties expressed in §4 of appellee's franchise from appellant. The separate demurrer to each paragraph of the complaint was sustained, to which ruling the appellant duly excepted, and refusing to plead further, judgment was entered in appellee's favor. These rulings of the court present the only questions for review.

Appellee sets forth a number of reasons in the memorandum attached to the demurrer, why the complaint is insufficient, the effect of all of which is to deny appellant's right to improve its streets in a manner other than that prescribed by special statute.

Following the usual preliminary averments in such complaint the substance of the charge is that the right to build its tracks and operate its cars over and upon appellant's streets was acquired through and by virtue of an ordinance of appellant, and the franchise therein granted. A copy of the ordinance and franchise is set out in full in the complaint and it is averred that appellee accepted all the conditions and provisions therein contained and has acted thereon and has operated its cars thereunder, and not otherwise. Section 4 of the ordinance and franchise, which is particularly important is:

“In case said city shall order the improvement of any or part of streets upon which the said interurban company's track is located, the said interurban company shall be liable for and bear its proportion of the cost of the improvement of said street, which propor-

City of Jeffersonville v. Louisville, etc., Traction Co.—59 Ind. App. 237.

tion shall be the cost of construction of all that part within its said tracks and twelve inches on each side thereof; and said interurban company shall not have the right to claim that the owners of real estate abutting on the line of said streets are liable for the interurban company's proportion of said cost."

It is further averred that while the said ordinance and franchise was in force, appellant on May 1, 1911, by its common council duly provided for and ordered the improvement of Market Street, one of the streets upon which appellee operated its track, by the following resolution:

"Be it Resolved, by the common council of the City of Jeffersonville, that it is necessary to improve Market Street from the east line of Meigs Avenue to the west line of said city, except that portion of Market Street at the intersection of Spring and Market streets, by macadam and screenings and road oil and to repair and construct suitable bridges over gutters in said street. Be it further resolved, that the Louisville and Southern Indiana Traction Company shall bear its proportion of the cost of such improvement of said street within its said tracks, on said street and twelve inches on each side thereof. Be it further resolved, That this resolution be adopted on this 1st day of May, 1911, for the improvement of the street as herein provided and according to the terms and provisions of this resolution."

That the improvement of Market Street was made and contracted as provided for in the terms of said resolution, and the contract and franchise granted by plaintiff to defendant and its predecessors, and that the improvement was not under or in compliance with the law of the State of Indiana, providing for the permanent improvement of streets and alleys by proceedings before the common council of said city. The improvement was made under such resolution duly adopted by the common council and approved by the mayor in writing. The defendant was given reasonable opportunity to make the said improvement as provided by said section of the ordinance. The council did not adopt or place on file detailed plans and specifications

City of Jeffersonville v. Louisville, etc., Traction Co.—59 Ind. App. 237.

for the improvement of the street. A preliminary resolution was not adopted, the improvement was not made by competitive bidders, but "said improvement was made by authority of said §4 of said ordinance by plaintiff, and defendant had notice of the same because of the fact that it was the owner of the privileges conferred by plaintiff in said ordinance, and as heretofore stated." Defendants had notice in writing and not otherwise of said improvement, before, at the time of and more than ten days after the same had been done. Defendant is indebted to plaintiff on account of the work and labor done and material used in the construction of the work in the sum of \$423.49.

The averments of the second paragraph of the complaint are similar to the first, except that the improvement described is on Missouri Avenue.

The complaint shows that the improvements referred to were not made in compliance with the laws of the State of Indiana relating to street improvements and the assessment of abutting property to pay therefor, but were made solely under and pursuant to a resolution passed by appellant's common council and the contract and franchise granted by such city to appellee and its predecessors. The controlling question then is, Can a city under such circumstances entirely ignore §§8655, 8710-8721 Burns 1914, Acts 1905 p. 219, Acts 1909 p. 412, Acts 1907 p. 167, Acts

1907 p. 550? It must be conceded that these statutes

1. provide one method for improving streets in a city and for collecting a portion of the cost of such improvement from a street railroad company occupying a portion thereof. But our statutes also provide that every city and town shall have exclusive power over streets and alleys, etc., "to extend and open streets and alleys and straighten, widen, and otherwise improve those already laid out, or that may hereafter be laid out." §8961 Burns 1914, Acts 1905 p. 383. So, to hold that the first-mentioned statutes alone control the method of making street improve-

City of Jeffersonville v. Louisville, etc., Traction Co.—59 Ind. App. 237.

ments, such as are involved in this case, would be in direct conflict with the last-mentioned statute, and a number of decisions of our courts, as well as of those of other jurisdictions having in many respects similar statutes. 1 Elliott, Roads and Sts. (3d ed.) §339; *Cummins v. City of Seymour* (1881), 79 Ind. 491, 493, 41 Am. Rep. 618, and cases cited; *Cooley, Mun. Corp.* §87; *City of Williamsport v. Commonwealth* (1877), 84 Pa. St. 487, 24 Am. Rep. 208; *City of Detroit v. Detroit United Railway* (1903), 133 Mich. 608, 95 N. W. 736; *White v. McKeesport* (1882), 101 Pa. St. 394; *City of Aurora v. Fox* (1881), 78 Ind. 1, 7; *City of Crawfordsville v. Braden* (1892), 130 Ind. 149, 28 N. E. 849, 30 Am. St. 214, 14 L. R. A. 268. Sections 8710-8721,

supra, apply only when a city seeks to improve its

2. streets at the expense of the abutting property owners, and they do not limit the general powers over streets conferred by other provisions of the law, under which a city may, in the exercise of its general powers and through its own officers and servants make street improvements.

The existence of the ordinance between the parties to this action being admitted by the separate demurrers to the separate paragraphs of the amended complaint

3. requires that this case, in view of what has already been said, must be determined upon the sufficiency of the contract contained in the ordinance irrespective of the provisions of the statute, *supra*, relating to the improvement of streets by assessment on the benefited abutting property. We are satisfied that the complaint discloses a valid subsisting contract between the city and appellee, and that the city improved that portion of the street occupied by the tracks of the street railroad company under that contract, and was entitled to recover the cost thereof from appellee, although the work was not attempted to be performed under §§8710-8721 or §8655, *supra*. Appellee's con-

Ervin v. Cline—59 Ind. App. 242.

tention would be upheld if the improvement had
4. been attempted under the sections of the statute last
cited, for the city would then have been required
3. to follow the statutes strictly. That discussion, however, does not apply here, for the facts averred show that the improvement was made in the exercise of appellant's general powers over its streets conferred by other provisions of the law, and agreeable to the contract between the parties. We are satisfied that in view of all the statutes which we have on the subject here involved, and the decisions construing them and similar ones, that we are not permitted to hold otherwise than that the complaint is sufficient to withstand the demurrer. Judgment reversed.

NOTE.—Reported in 107 N. E. 748. As to purposes for which a municipal corporation may levy taxes and assessments, see 16 Am. St. 365. See, also, under (1, 2, 4) 28 Cyc. 946.

ERVIN v. CLINE.

[No. 8,602. Filed June 17, 1915.]

APPEAL.—*Review.*—*Verdict.*—*Evidence.*—Where plaintiff charged that defendant, as his agent, had procured a certain contract whereby a third person was to exchange lands with plaintiff, and that defendant had caused plaintiff to cancel such contract and had received \$1,500 for so doing, and sought to recover such sum from defendant, less a reasonable amount for commission; and the contracts in evidence, construed together, showed that defendant could not be held for a share of the profits unless the exchange of land was completed; and there was parol evidence that defendant was not plaintiff's agent, but that they were to be partners if the exchange was consummated, as well as the testimony of defendant that he did not cancel or procure the cancellation of the contract, and evidence showing that the \$1,500. received by defendant was for prior services rendered to the owners of the land held in the name of such third person, a verdict for defendant can not be disturbed.

From Superior Court of Marion County (82,426); *Vinson Carter*, Judge.

Action by Edmon P. Ervin against Benjamin F. Cline. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Donald S. Morris and Wm. Featherngill, for appellant.
Charles F. Remy and James M. Berryhill, for appellee.

IBACH, P. J.—The only question presented is whether there is evidence to sustain the verdict.

The theory of the complaint is that appellee, defendant below, had as appellant's agent obtained a contract whereby one Dr. McKinstry was to exchange lands with appellant, that appellee had caused appellant to cancel this contract, and had been paid \$1,500 for so doing, that appellant had demanded that appellee turn this money over to him, less a reasonable commission, that appellee failed to turn over any part of it, and had converted it to his own use. The prayer was for the recovery of this \$1,500, and of \$2,000 which would have been appellant's profits on the deal.

There were in evidence four written exhibits. The first, dated December 15, 1909, was a proposition from McKinstry to appellee, offering to exchange with him or those whom he represented, certain described lands for certain other described lands. There was written on this paper an acceptance of the proposition signed by appellant, dated December 16, 1909. The second exhibit was a deed dated January 14, 1910, from McKinstry to Joseph E. Bell for the same lands, upon the consideration of \$36,000. The third was an agreement between appellee and appellant, dated December 17, 1909, whereby appellant was to purchase the same real estate described in McKinstry's proposition and deed, for \$36,700, and appellee was to have the exclusive right to sell the whole or any part of it for two years, and to plat and subdivide it, and after all expenses were paid, appellee was to have two-thirds of the profits, and appellant the remainder; and appellee insured to appellant that he would sell the land at a price to realize \$36,700

and expenses, or would buy it himself at that price. The fourth exhibit was a rider to the third, in the following words:

“It is agreed by and between Benjamin F. Cline and Edmon P. Ervin, the parties to the annexed and following agreement, that said agreement is executed and delivered upon the expressed condition that the said Cline shall complete the exchange of real estate with one Homer R. McKinstry as set forth in a written proposition made by McKinstry under date of December 15, 1909, and accepted by said Ervin on December 16, 1909. And if said Cline shall fail to complete said exchange of real estate as set forth in the above named written proposition, then the following contract to which this agreement is attached, executed by said Cline and Ervin on this date shall be absolutely void and the same shall be returned to the said Edmon P. Ervin.”

There was evidence that the three contracts between Ervin and Cline were all signed at the same time, or at least that the first one was signed on December 16, and all delivered together on December 17. Such being the case they must all be construed together, and according to their terms, appellee can not be held by appellant for a share in profits, unless the exchange between appellant and McKinstry was completed. In confirmation of this construction of the contracts, there was parol testimony that Cline was not Ervin's agent in the deal, but that he and Ervin were to have been partners had it gone through, and that such contract of partnership was not to be entered into unless the McKinstry deal was consummated. Appellee said that he did not cancel the McKinstry contract, and did not procure its cancellation. The evidence showed, and appellee admits, that he received \$1,500 from his brother Fred Cline and Dr. Kimberlin, who were the real owners of the land to which they had taken title in the name of Dr. McKinstry when they purchased it. Appellee explains the receipt of the money by saying that he was instrumental in aiding his brother and

Dr. Kimberlin to purchase the land in the first place, and was to be paid for his services when it was sold, that in fulfilment of this agreement they paid him \$1,500, after they sold the land, for what he had done for them when they purchased it, that he did not receive this as commission for selling the land to Bell, nor for the cancellation of the contract with Ervin, but solely for his services rendered when Fred Cline and Dr. Kimberlin originally purchased the land. Thus there was some evidence whereby the court was justified in finding that appellee had not committed the acts charged by appellant in his complaint, and was not liable to him for breach of trust. Judgment affirmed.

NOTE.—Reported in 109 N. E. 214. As to admission of parol evidence to aid construction of contract, see 5 Am. Rep. 241; 122 Am. St. 545. See, also, 3 Cyc. 348.

ZIMMERMAN v. CARR.

[No. 8,637. Filed June 18, 1915.]

1. LANDLORD AND TENANT.—*Action for Rent.—Right to Trial by Jury.—Impanelling Jury.*—Under Art. 1, §20, of the Constitution providing that the right to trial by jury in civil causes shall remain inviolate, the defendant in an action for rent due under a lease was entitled to have his cause tried by competent and impartial jurors, and to that end to have invoked the rules of law applicable to the selection and impanelling of juries, in the absence of anything amounting to a waiver of such right. p. 247.
2. JURY.—*Selecting and Impanelling Jury.—Presumptions.*—After verdict, it will be presumed that the jurors were selected in the light of the provision of law that affords a trial by qualified jurors, and the party alleging disqualification has the burden to establish same. p. 247.
3. JURY.—*Qualifications of Jurors.*—A juror is not qualified to sit in the trial of a cause if his eyesight is so defective that he can not see the expression on the faces of the witnesses and observe their deportment and demeanor while testifying, or if his hearing is so defective that he can not fully understand the proceedings, or if he is otherwise physically unfit to discharge the duties he is called upon to perform. p. 247.

4. *NEW TRIAL.—Grounds.—Disqualification of Jurors.—Affidavit.—Sufficiency.*—An affidavit in support of a motion for new trial on the ground that a juror was disqualified because of deafness, which set forth facts merely showing that the juror did not hear all the testimony of the witnesses, but which did not affirmatively disclose that such failure was due to the deafness of the juror, was insufficient. p.248.

From Porter Superior Court; *Harry B. Tuthill*, Judge.

Action by Drucilla Carr against Abraham Zimmerman. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

McAleer Bros. & McGirr, for appellant.

D. E. Kelley and *F. B. Fabing*, for appellee.

MORAN, J.—Judgment was rendered in the court below on the verdict of a jury in the sum of \$1,350 against appellant in favor of appellee, for rent found to be due appellee under a written lease on lot 2, block 6 in the town of Miller, Lake County, Indiana. And from this judgment an appeal has been taken.

The question presented for review arises under the error assigned in overruling appellant's motion for a new trial, viz., that one of the jurors, who was a member of the panel that returned the verdict upon which judgment was rendered, was incompetent to sit as a juror in the trial of the cause. The incompetency was not discovered, it is alleged, until after the trial of the cause, when the trial court's attention was directed thereto by an affidavit, which was filed with and made a part of the cause asking for a new trial by reason thereof.

The affidavit, omitting the caption and signature of affiant, is as follows: "William J. McAleer, being first duly sworn, upon his oath, deposes and says, that on the 24th day of February, 1913, while examining the jury that was duly sworn to answer questions testing their competency to act as jurors in the cause of O'Shea v. C. S. and B. I. Railway Co., in the Porter Circuit Court, he discovered that one

Jake Fisher was somewhat deaf, and did not hear the questions propounded to him by appellant, and while said Jake Fisher was answering questions on his *voir dire* to his competency to act as a juror, this affiant asked said Jake Fisher whether or not he sat on the jury in the previous case, to which he replied that he did sit on said jury in said cause. Whereupon this affiant asked if he heard all that the witnesses said in the previous case, to which the said Jake Fisher replied that he did not hear all the witnesses said in the previous case. Affiant further swears that the previous case tried in said court, and upon which said juror sat and acted as a juror, was the cause of Drucilla Carr v. Abraham Zimmerman, No. 9110."

In entering upon an examination of the questions here involved two general propositions must be kept in mind,

first, in a civil cause such as is under consideration,

1. the right of trial by jury remains inviolate (Art. 1, §20, Constitution), and appellant was entitled to have his cause tried by fair, competent, and impartial triers, and in the selection and impaneling, he was entitled to have invoked the rules of law intended to safeguard and assure him a fair trial, unless in some manner the same were waived; second, after verdict, it will be presumed
2. that the jurors were selected in the light of the provision of law that affords a trial by qualified jurors, and the burden of establishing disqualification is upon the party alleging the existence of the same. 24 Cyc. 196; *State v. Weaver* (1900), 58 S. C. 106, 36 S. E. 499.

A juror is not qualified to sit in the trial of a cause if he is physically unfit to properly discharge the duties he is called upon to perform. It has been held that,

3. "A person is not qualified to sit on a jury, who is physically unfit to properly discharge the duties of a juror, that where his eyesight is so defective that he cannot see the expression on the faces of the witnesses and observe their deportment and demeanor while testifying,

or where his hearing is so defective that he cannot fully understand the proceedings." 24 Cyc. 196; *Rhodes v. State* (1891), 128 Ind. 189, 27 N. E. 866, 25 Am. St. 429. In *Lafayette Plankroad Co. v. New Albany, etc., R. Co.* (1859), 13 Ind. 90, 74 Am. Dec. 246, it was held that a juror was not competent, who could neither read nor write the English language, nor understand it when spoken to him, upon subjects other than such as related to his particular business, and then but imperfectly. In *Rhodes v. State, supra*, the defendant through his counsel thoroughly examined the jurors as to their qualifications, nevertheless, it was not discovered until after the trial that the eyesight of one of the jurors was so impaired, that he did not see the expression of the witnesses, who testified, nor observe their deportment or demeanor upon the witness stand, and in this connection, the court said: "We think the juror was not competent to sit even in cases where the testimony consists entirely of the statements of the witnesses. Again and again have verdicts been allowed to stand because of the effect declared to be exerted by the demeanor and deportment of the witnesses, and surely no one, who can not see the expression of faces, nor observe deportment and demeanor, can justly weigh testimony."

For cogent reasons this same rule would apply to the infirmity of deafness. Does the state of the record bring the cause at bar within the rule thus announced?

4. It will be noticed, that the affidavit, which is the foundation of the cause for a new trial, states that the juror did not hear all that was said, during the introduction of the evidence, but it does not disclose affirmatively that this was by reason of his infirmity. Many things might have prevented him from hearing all of the evidence; the tone of voice of a witness might have been such as to interfere with the juror hearing testimony, and there may have been confusion in the courtroom during the progress of the trial that may have interfered with the hearing of

Almy v. Commercial, etc., Assn.—59 Ind. App. 249.

the juror from aught that the affidavit discloses. Should it be conceded that the question was properly raised in all other particulars, the affidavit is not sufficient to show that the physical infirmity of the juror in this behalf was such as to render him incompetent as a juror.

As to whether the question sought to be presented was waived by a failure to show that the juror was duly examined as to his qualifications before entering upon the trial, or that harm must have resulted to appellant, we express no opinion. The state of the record is such as not to call for an opinion upon either of these propositions. For a full collection of the authorities upon this subject, see note to *State v. Harris* (1911), 50 L. R. A. (N. S.) 973.

No error was committed by the trial court in overruling the motion for a new trial. Judgment affirmed.

NOTE.—Reported in 109 N. E. 218. As to ability to read and write English as necessary qualification of juror, see 35 Am. Rep. 728. As to the disqualification of a juror as grounds for new trial, see 1 Ann. Cas. 196; 12 Ann. Cas. 922. See, also, under (1) 24 Cyc. 101; (2, 3) 24-Cyc. 196; (4) 29 Cyc. 980.

ALMY ET AL. v. THE COMMERCIAL TRAVELERS ASSOCIATION OF INDIANA.

[No. 8,397. Filed November 24, 1914. Rehearing denied April 15, 1915. Transfer denied June 18, 1915.]

1. PLEADING.—*Complaint.*—*Answer.*—*Ruling on Demurrer.*—Until a good complaint has been placed on file, an answer has no office to perform, and the ruling on a demurrer thereto presents no error. p. 256.
2. INSURANCE.—*Mutual Benefit Insurance.*—*Change of Beneficiaries.*—*Rights of Former Beneficiary.*—*By-Laws.*—A cross-complaint by a former beneficiary of decedent under a mutual benefit certificate, disclosing the fact that the beneficiary had been changed and a new certificate issued which was in force at decedent's death, and alleging that the change of beneficiaries was not made in accordance with a by-law requiring proof of notice to the beneficiary named in a certificate before a change of bene-

Almy v. Commercial, etc., Assn.—59 Ind. App. 249.

fiary could be made, was insufficient to show any right of action in cross-complainant. pp. 257, 259.

3. **INSURANCE.—*Mutual Benefit Insurance.—Rights of Beneficiary.***—A beneficiary in a mutual benefit certificate ordinarily has no indefeasible or vested interest in the certificate, owing to the fact that the power of changing the beneficiary is usually reserved to the person insured either by a by-law of the association or by statute. p. 257.
4. **INSURANCE.—*Mutual Benefit Insurance.—Contracts.—By-Laws.***—The by-laws of a mutual benefit society are regarded as a part of the contract between it and one to whom a certificate is issued. p. 258.
5. **INSURANCE.—*Mutual Benefit Insurance.—Change of Beneficiaries.—By-Laws.—Waiver.***—The provision in a by-law of a mutual benefit society providing that proof of notice to the beneficiary named in a certificate is necessary before a change of the beneficiary may be had, is for the protection of the society and one which it may waive, so that on a change of beneficiary being consummated during the lifetime of the member without compliance with such by-law, the original beneficiary, if without any previously acquired equity in the certificate, can not attack the change. p. 250.

From Superior Court of Vigo County; *John E. Cox*, Judge.

Action on the petition of The Commercial Travelers Association of Indiana to require the defendants to interplead for the purpose of determining the person entitled to the benefits under a certificate of insurance. From the judgment rendered, this appeal is prosecuted. *Affirmed.*

Davis, Bogart & Royse, for appellants.

Barrett & Barrett and George H. Batchelor, for appellee.

HOTEL, C. J.—The appellee, “The Commercial Travelers’ Association of Indiana”, is a fraternal organization composed of commercial travelers engaged in business in the State of Indiana. The by-laws of this organization provide that a certificate of membership therein shall carry with it certain death benefits hereinafter more particularly set forth.

On October 30, 1886, Charles W. Almy became a mem-

Almy v. Commercial, etc., Assn.—59 Ind. App. 249.

ber of said association and there was on that date issued to him a certificate of said association No. 948, which reads as follows:

“No. 948. Payable to Allie Almy, wife. The Commercial Travellers Association of the State of Indiana. (Indiana State Seal.) This is to certify that Charles W. Almy of Terre Haute, Indiana, is an accepted member of the Commercial Travellers Association, of the State of Indiana; that he is subject to all the requirements, and entitled to all the benefits of said association. In Witness Whereof,”

etc., signed by its president and secretary. At the time of the issuing of this certificate the insured and Allie Almy were husband and wife. Afterwards and before the issuing of the other certificates hereinafter indicated they were divorced. On May 29, 1897, Charles W. Almy presented to the board of directors of said association his written request for a change of beneficiary in his certificate of membership in said association, which request was as follows:

“Terre Haute, Ind., May 29, '97.

To the Board of Directors,

Commercial Travelers' Association of Indiana.

Please change beneficiary on certificate of membership No. 948, which is hereby surrendered, from Allie Almy, my wife, to Iva Belle Almy, our daughter.

Charles W. Almy.”

Upon this request the board of directors of said association cancelled said original certificate of membership and ordered issued a new certificate, No. 2024, which was substantially the same as No. 948 above, except the number and date and the name of the beneficiary thereof, and except also that the latter certificate contained the following additional words: “Issued in lieu of certificate number 948, surrendered.” On June 22, 1903, said Charles W. Almy again presented his request in writing, substantially the same as his former request above set out, asking for a change of beneficiary on his certificate of membership, and that he himself be

Almy v. Commercial, etc., Assn.—59 Ind. App. 249.

named as the beneficiary. Thereupon the association cancelled certificate No. 2024, and issued a new certificate, No. 2387, which certificate except as to such changes was substantially the same as No. 2024. On December 31, 1904, said Charles W. Almy presented to said association the following written request:

“To the Commercial Travellers’ Association of Inda. and the Board of Directors.

Gentlemen:—I hereby return my certificate No. 2387 which is payable to myself, and ask that a new certificate be issued in lieu thereof, and that my sister Mrs. Clara Grant be named and designated as beneficiary, and I now surrender this certificate for that purpose. December 31st, 1904. Charles W. Almy.”

On January 7, 1905, said association cancelled said certificate No. 2387, and issued a new certificate, being No. 2453, payable to Clara Grant, the form of which was substantially the same as before indicated. This certificate No. 2453 was outstanding on June 10, 1910, at which date Charles W. Almy died a member of said association.

On July 25, 1910, appellee filed in the Vigo Superior Court, a bill of interpleader, naming as defendants therein, Clara Grant, Iva Belle Almy and Allie Almy. In this petition appellee sets out at length the facts connected with the issuing to Charles W. Almy of the several certificates of membership in such association and the surrender and cancellation by an order of its board of directors of all of such certificates except that issued payable to Clara Grant. Such petition also sets out a copy of the articles of incorporation, constitution and by-laws of such association, and avers that Charles W. Almy died on June 10, 1910; that there is due and owing from it to the beneficiary of Charles W. Almy the sum of \$2,000 less an assessment of \$3 tendered by each of said defendants; that such defendants are each claiming the money due on the membership of Charles W. Almy. The petition asks that the defendants thereto be required to interplead in order that the court may deter-

Almy v. Commercial, etc., Assn.—59 Ind. App. 249.

mine which of them is entitled to the benefits payable by appellee by reason of the death of Charles W. Almy. A demurrer was filed to this petition of interpleader but was never ruled on. As to such petition no other or further entry is shown by the record.

The appellant, Iva Belle Almy, filed a pleading in two paragraphs which she terms a cross-complaint, naming as sole defendant therein, the appellee association. These paragraphs differ from each other, in that the cross-complainant, in the first paragraph, seeks to recover on the second certificate, being the one issued to herself, and in the second paragraph she seeks to recover on the first certificate as assignee of her mother, Allie Almy.

Each of these paragraphs alleges the issuing of each of the several certificates and the cancellation of each certificate except that payable to Clara Grant, all as above set out, and the particular certificate on which recovery is predicated in the particular paragraph is set out in such paragraph. Each of such paragraphs also contains the following sections of appellee's by-laws, viz.:

“Sec. 7. Any member making application for a new certificate on the ground that original is destroyed or lost or for change of beneficiary, may have request granted upon filling out and signing the regular form provided for such cases; Provided, That where the name of the beneficiary is to be changed, such applicant shall also furnish proof in writing that he has notified the beneficiary named in such certificate, then held by him and desired to be changed, or show good cause why such notice can not be served, that he requests such change to be made by the Board of Directors, giving the time when he shall ask such change, or in lieu of such notice, such applicant shall furnish a request from such beneficiary, directing such change to be made, but the board of directors shall have full power and authority to grant or refuse to make such change, and any decision made by such board shall be final and conclusive and shall not be reviewable, and upon changing the name of the beneficiary as herein provided, the benefit certificate so held by such member shall be by him surrendered

and a new one in lieu thereof issued, and upon the issuing of such new certificate all liability of said Association under such former certificate shall cease and be determined, and such certificate shall be void, and the only liability of this association shall be under and by virtue of such last certificate so issued as herein provided. All applicants for change as herein provided shall, with their application pay to the treasurer a fee of fifty cents. Sec. 2. Upon the death of a member of the association, and within forty-five days after the receipt of satisfactory proof of the death of such member, the board of directors shall pay the executor or administrator of the deceased member, or to the beneficiary or beneficiaries named in the benefit certificate issued to such member, if a beneficiary or beneficiaries be named therein, * * *

Then follow the provisions of such by-law showing the basis on which the amount of benefits is determined and averments showing performance by appellant of the things required of her by such by-laws, and that the amount of her recovery should be \$2,000.

In connection with the averments as to the surrender and cancellation of each of said certificates of membership each paragraph of cross-complaint alleged in substance (omitting names and numbers), that at the time of delivering said certificate number — to said association and receiving said certificate number — in lieu and place thereof Charles W. Almy wholly failed to furnish to said association any proof in writing whatsoever that he had notified the beneficiary named in the certificate to wit, — giving the time when he should ask such change, and did not furnish such proof, and did not so notify said — of his intention to apply to the association for a change of beneficiary, and Charles W. Almy at that time wholly failed to show to the association any good cause why such notice could not then have been served on said —, and Charles W. Almy at that time wholly failed to and did not furnish to said association any request to make such change of beneficiary from said — to said — named in the

Almy v. Commercial, etc., Assn.—59 Ind. App. 249.

certificate number — as the beneficiary, and that such beneficiary therein named never made any request for such change.

To these paragraphs of cross-complaint the association appeared and filed a special answer in two paragraphs, the first of which, sets out in full the various certificates issued to Charles W. Almy, the assured's several written applications for a new certificate and change of beneficiary, the substance of each of which we have hereinbefore set out, and the action of appellee's board of directors in the cancellation of the old and the issuing of the new certificate in each case.

The answer admits the existence of section 7 of the by-laws, set out in the cross-complaint, and sets out §5042 Burns 1908, §3 Acts 1877 p. 6, viz., "All certificates of membership, policies or other evidences of interest in any Masonic, Odd Fellow or other benevolent or charitable association, society or incorporation, named in section 1 of this act, shall be regarded as a contract between the person whose life is insured by such certificate of membership, policy or other evidence of interest, and the association, society or incorporation of which he is a member; and it shall be lawful for such association, society or incorporation to change the name or names of the payee, beneficiary or beneficiaries named in such certificate of membership, policy or other evidence of interest, on such terms and conditions as the parties to the contract may agree to." This paragraph contains other averments, most of which are of an argumentative character, and need not be set out.

The second paragraph of answer to said cross-complaint admitted the issuing of said several certificates as alleged in the cross-complaint and averred that under the law of the State of Indiana no beneficiary had any vested interest in either of said certificates; that Charles W. Almy to whom they were each issued retained the custody and control of each until its surrender, and each certificate, except that

issued payable to Clara Grant was voluntarily surrendered by him to the appellee and such surrender duly accepted by appellee's board of directors and each of such certificates was by such board duly cancelled more than five years before the death of Charles W. Almy. To each of these answers the cross-complainant, Ivy Belle Almy filed a demurrer which was overruled and exceptions were properly saved by her. The appellant declined to plead further and stood on the ruling of the court on her demurrer to each of the answers to her cross-complaint, and thereupon the court rendered judgment against her on such cross-complaint and for appellee for costs.

Appellant, Iva Belle Almy, alone assigns error in this court, and the ruling on her demurrer to the answers of appellee to her cross-complaint is relied on for a reversal. She concedes that the sole question involved in her appeal is the construction of section 7 of appellee's by-laws above set out.

Before going to this question it is proper to say that other pleadings were filed and proceedings had in the case of which we have made no mention and several questions of practice and procedure both in the trial court and in this court are raised by appellee, the determination of some of which, if in its favor, might result in a dismissal of the appeal, but inasmuch as our investigation of said question presented by appellant on the merits of the case leads to a conclusion favorable to appellee, its interests will not be prejudicially affected by our failure to consider such other pleadings, proceedings and questions of practice, and we therefore go direct to a disposition of the question presented by appellant on the merits of the case.

It is well settled that an answer has no office to perform until a good complaint has been placed on file, and that the ruling on a demurrer to an answer to a bad com-

1. plaint does not present reversible error in this court.

Alexander v. Spaulding (1903), 160 Ind. 176, 180,

Almy v. Commercial, etc., Assn.—59 Ind. App. 249.

66 N. E. 694, and cases cited; *Zenor v. Pryor* (1914), 57 Ind. App. 222, 106 N. E. 746.

It will be observed that in each paragraph of appellant's cross-complaint she avers facts showing the cancellation and surrender of the certificates of membership on which

2. she seeks to recover, and alleges that a new certificate of membership was issued to the decedent in lieu of that on which she predicates her right to recover. She avers facts showing that the beneficiaries of such certificates were changed from time to time, until the final certificate in which Clara Grant was mentioned as beneficiary was issued, and that this certificate was the last issued and was outstanding when Charles W. Almy died. It follows from the averments indicated that appellant in her cross-complaint defeats her own right of recovery and shows that such right exists in another, unless it can be said that she has also alleged in her cross-complaint facts sufficient to show that the surrender by the decedent, and the cancellation by appellee, of the certificates on which she bases her right of action and the issuing of the other certificates in which the other beneficiaries were named was without authority and invalid as against her. The averments on this subject on which appellant relies are the provisions of section 7 of appellee's by-laws above set out which provides that, "where the name of the beneficiary is to be changed such applicant shall furnish proof in writing that he has notified the beneficiary named in the certificate held by him and desired to be changed or show good cause why such notice could not be served," and the averments which negative a compliance with such provisions of the by-laws.

This brings us to a consideration of the question which appellant concedes to be the sole question involved in the appeal. It is conceded by appellant that the author-

3. ities hold that a beneficiary in a certificate issued by a mutual benefit association, such as appellee, ordi-

narly has no indefeasible or vested interest in the certificate or policy. *Masonic, etc., Soc. v. Burkhart* (1887), 110 Ind. 189, 190, 191, 10 N. E. 79, 11 N. E. 449, and authorities cited; *Bunyan v. Reed* (1904), 34 Ind. App. 295, 300, 301, 70 N. E. 102, and authorities cited; *Milner v. Bowman* (1889), 119 Ind. 448, 452, 21 N. E. 1094, 5 L. R. A. 95; *Modern Brotherhood v. Matkovitch* (1914), 56 Ind. App. 8, 104 N. E. 795. She insists, however, that this is true only because in such associations the power of changing the beneficiary is ordinarily reserved to the member insured either by some by-law of the association or by statute. In this connection it is further insisted that while §5042 Burns 1908, *supra*, expressly provides that certificates of membership of the kind here involved shall be regarded as a contract between the person whose life is insured by such certificate and the association issuing the certificate, and that it shall be lawful for such association to change the name of such beneficiary, that such change can only be made "*on such terms and conditions as the parties to the contract agree to*"; that appellee's by-laws are a part of the contract between it and the decedent, and that the provision above referred to required a notice to the beneficiary in the certificate sought to be changed. It is doubtless true, as appellant contends, that the reason why the courts have held that a beneficiary of a certificate in a mutual benefit association of the kind here involved has no vested interest therein is because the power of changing such beneficiary is ordinarily reserved to the member insured either by some by-law of the association or by statute, and it is doubtless true also, that the absence of such reserved power in the ordinary life insurance policy furnishes the reason for the contrary holdings as to such policies. In other words, such question is controlled by the contract between the parties. It

4. is also true as appellant contends that the by-laws of an association of the kind here involved are to be treated as a part of the contract between it and the assured.

Almy v. Commercial, etc., Assn.—59 Ind. App. 249.

Masonic, etc., Soc. v. Burkhart, supra; Holland v. Taylor (1887), 111 Ind. 121, 12 N. E. 116; *Mason v. Mason* (1903), 160 Ind. 191, 196, 65 N. E. 585; *Bunyan v. Reed, supra; Farra v. Braman* (1909), 171 Ind. 529, 540, 541, 86 N. E.

843. The admission of the correctness of appellant's contention in said respects, however, does not avail her anything in this case. In the instant case both the by-

2. laws of appellee association and the statute, *supra*, expressly reserved to appellee and the assured the right to change the beneficiary in either or any of

5. the certificates issued by appellee. True, there is in the by-laws the provision above indicated, but it has been expressly held that such provisions are for the protection of the association, and that the association may in the lifetime of its member waive such provision and estop itself from insisting thereon, and where the association has waived compliance with such regulation and estopped itself from asserting or insisting on compliance therewith no one who is merely a volunteer beneficiary may raise such objection. 29 Cyc. 133, 135-137, and cases cited; *Modern Brotherhood v. Matkovitch, supra*. The authorities all seem to hold that where there has been a change consummated and acted on by the society in a member's lifetime, the original beneficiary, if a volunteer only, has no standing to attack the change because it was not made in compliance with the regulations of the society. 29 Cyc. 135, and cases cited in note 74. Of course, if the original beneficiary had acquired any contractual equity in the cancelled certificate, the cancellation of such certificate without notice to such beneficiary would not bind him, and it was, doubtless, for the purpose of protecting itself against such cases that appellee put into its by-laws the provision for notice to such beneficiary, so that he might appear and resist the change before it was made, and that appellee might be protected thereby against any contractual equity of such beneficiary. If, however, the association is willing to waive such provision and take

Smith v. Frantz—59 Ind. App. 260.

its chances, it may do so; but it takes no chance as against a volunteer beneficiary. If the beneficiary has no equitable ground on which he could have resisted and prevented the change of beneficiary in the first instance, he has not been harmed by the company's waiver of its right to know before making the change whether he had such grounds.

Appellant in her cross-complaint sets up no contractual equity or claim of any kind to benefits under the certificates on which she sues, but on the contrary, shows that she is a volunteer beneficiary only, and that the certificates on which she sues were cancelled and surrendered in the lifetime of the assured. For this reason the cross-complaint fails to state a cause of action against appellee and hence the ruling on the demurrer to the answers thereto does not present reversible error. Judgment affirmed.

NOTE.—Reported in 106 N. E. 893. As to features of law specially applicable to mutual or membership life or accident insurance, see 52 Am. St. 543. As to the effect of changing designation in benefit certificate otherwise than in prescribed method, see 15 L. R. A. 350. As to the validity of amendments to by-laws of fraternal benefit societies as applied to existing members, see Ann. Cas. 1913 C 675; Ann. Cas. 1914 D 63. As to the binding effect on a member of a benefit society of a by-law inconsistent with his contract of membership, see 20 Ann. Cas. 929. See, also, under (1) 31 Cyc. 358; (2) 29 Cyc. 223; (3) 29 Cyc. 125; (4) 29 Cyc. 68.

SMITH v. FRANTZ.

[No. 8,588. Filed June 22, 1915.]

1. APPEAL.—*Review.—Harmless Error.—Ruling on Demurrer.*—Even though the overruling of demurrers to special paragraphs of answer was error, on the ground that such answers set up matter within the rule that parol evidence can not be received to show that the consideration for a written contract was different from that expressed therein, or that there was no consideration, the error was harmless, where the court refused evidence as to negotiations prior to the making of the contract set

Smith v. Frantz—59 Ind. App. 260.

out in plaintiff's complaint, and no evidence was offered to show a want of consideration. p. 265.

2. **CONTRACTS.—Consideration.—Parol Evidence.**—Where the consideration is contractual, the consideration mentioned in a written contract can not be varied by parol evidence. p. 265.
3. **CONTRACTS.—Action.—Failure of Consideration.—Pleading.—General Denial.**—As a general rule want of consideration must be pleaded in order to be available as a defense, but where the complaint sets out the consideration for the contract sued on and makes the contract an exhibit, and the contract sets out the consideration, evidence of want of consideration is admissible under the general denial. p. 265.
4. **CONTRACTS.—Construction by Parties.—Evidence.—Instructions.**—In an action by the purchaser of land against a tenant involving his right to a corn crop planted and matured subsequent to his execution of a contract to surrender on September 1, 1910, his lease which expired in 1911, where the contract was not clear and no mention was made as to what crops might be raised during the year 1910, evidence showing that the parties, other than plaintiff, understood that the contract was merely to permit plaintiff the use of the farm in 1911 and the right to sow wheat in 1910, and that defendant was to have the right to harvest the corn raised by him in 1910, and that plaintiff himself so understood the contract until October 21, 1910, and had permitted defendant to plant and cultivate the corn without objection, was properly submitted to the jury under instructions that defendant had a right to the corn if he planted and cultivated it with the knowledge and consent of plaintiff and with the understanding that he had a right to do so under the lease from plaintiff's grantors, and informing the jury fully and correctly as to the rights of both the owner of the land and the tenant where crops are planted which can not be harvested before the expiration of the tenancy, etc. pp. 265, 270.
5. **CONTRACTS.—Construction.—Construction by Parties.**—The construction placed by the parties on an ambiguous contract, and acted upon by them, is entitled to great weight, and, if reasonable, will be adopted by the court, even though the court might probably adopt a different construction were it not for the practical construction already given by the parties. p. 269.
6. **LANDLORD AND TENANT.—Tenant Under Former Owner.—Right to Crops.**—If possible, the law allows the one who sows to reap; hence the courts go far in holding that the owner of land, who allows a tenant under a previous owner to plant and cultivate crops without objection or the assertion of any rights therein, is estopped to assert any claim thereto. p. 270.

From Wabash Circuit Court; A. H. Plummer, Judge.

Smith v. Frantz—59 Ind. App. 260.

Action by John E. Smith against Cyrus Frantz. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Petitt & Switzer, for appellant.

Sayre & Hunter, for appellee.

IBACH, P. J.—The complaint by appellant against appellee is in two paragraphs, in the first of which it was sought to replevin some corn and wood, in the second to recover damages for the conversion of the same corn and wood.

The first paragraph alleges that appellant is the owner of certain described lands in Wabash County, Indiana; that he acquired title thereto by warranty deed from Elizabeth Smith, John G. Smith, Blanche B. Smith, Howard F. Smith and Beulah Smith, on April 14, 1910; that at the time of purchase appellee was a tenant thereon of the grantors, under a lease extending beyond September 1, 1910; that on said date appellee entered into a written contract with appellant, John E. Smith, and Howard F. Smith, whereby appellee agreed to cancel his lease on September 1, 1910; that subsequently appellee plowed and planted thirty-five acres of said land in corn, notwithstanding that under the provisions of his contract, his tenancy and the right to remove crops therefrom would expire on September 1, 1910, and he well knew that he could not plant, mature, and harvest a crop of corn before that time; that at and before the time he planted the corn, he was notified not to do so by appellant; that he raised corn to the amount of 1,500 bushels, 1,000 bushels of which is in his possession; that he is also in possession of thirty cords of wood, taken from said farm subsequent to September 1, 1910, which is the property of appellant; that he is denying appellant's ownership of the corn and wood; that appellant is the owner and lawfully entitled to possession of the corn and wood. The same facts are alleged in the second paragraph, with the additional averment that appellee has converted the corn and wood to his own use, and the prayer is for damages.

Smith v. Frantz—59 Ind. App. 260.

To each paragraph there is annexed a copy of the following contract as an exhibit:

“This contract drew this day between J. E. Smith and the Ira F. Smith heirs known in this agreement as party of the first part. And Cyrus Frantz known in this agreement as party of the second part, Witnesseth, That party of second part surrenders his lease to party of the first part on farm in Wabash Co., Pawpaw Tp. Indiana. Known as the Ira F. Smith farm on September 1, 1910. Party of the second part also surrenders wheat ground to party of the first part in reasonable time for sowing and getting ready to seed. Party of second part to retain pasture, farm buildings, and fruit, rent free until March 1, 1911. Party of second part to cut any clover seed that may be on said farm and divide same equally with J. E. Smith. Each to pay their share of threshing same. Party of second part agrees to haul out land tax on said farm in 1910, and deliver receipt to J. E. Smith. Party of second part agrees to haul Elizabeth Smith's wood to Roann during time inclusive to March 1, 1911, free, Ira F. Smith heirs agree to pay said Cyrus Frantz the sum of Fifty dollars (\$50.00) as part of this contract. In witness hereof we have hereunto affixed our signatures. (Signed) Jno. G. Smith, Cyrus Frantz, Howard Smith, J. E. Smith.”

There was an answer in general denial, a second paragraph admitting the signing of the alleged contract as above set out, but saying that it was executed without any consideration, and a third paragraph stating that on August 5, 1908, appellee was and had been for five years, in possession of the land described in the complaint as a tenant, was paying cash rent therefor, and had a crop of corn growing on said land which he in consideration of the agreement had the right to return and gather as his own, his general tenancy expiring on September 1, 1908; that on August 5, 1908, in consideration that he should have all crops that he might grow on said land in each of the three successive years, and return to harvest any crop growing thereon, and not matured by September 1, such as corn, entered into an agreement for the use of said farm with the then owner,

Elizabeth Smith, administratrix of the estate of Ira F. Smith on representation of such owner, a copy of which agreement is set out. This agreement is a lease of the farm for a term of three years beginning September 1, 1908, and ending September 1, 1911, on consideration of the payment of \$500 annually on September 1 of each year. No mention is made as to what crops are to be raised, and there are some minor stipulations as to fences and firewood, and as to certain amount of grass to be left on the farm at the expiration of the contract. It is further alleged that appellee continued to occupy the land under the contract, doing all that he was to do thereunder, until April 1, 1910, when his landlady, Mrs. Smith, desired to sell the farm to appellant, and appellant desired to acquire the right to enter on the land and sow wheat in the fall of 1910, and to have appellee to waive his right to plant crops in the spring of 1911, and to give up possession of the land on March 1, 1911, and appellee had paid the rent in full in cash for the year beginning September 1, 1909, and ending September 1, 1910, during which time the wood was cut and the corn was raised, that was sued for; that appellee agreed in consideration of \$50 in hand paid, that he would yield the right to appellant to enter and sow wheat in the fall of 1910, and would give to him full possession of the premises on March 1, 1911, all of which he did; that said contract was in parol and fully executed, and that the corn and wood sued for were raised and cut in the year 1910, under said written contract, and during said tenancy as modified by said period of agreement only; that afterwards the contract in suit was presented to him and he signed the same but there was no consideration whatever for his so doing.

Demurrers to the second and third paragraphs of answer for want of facts were overruled, issues were completed by replies in denial, the cause was tried by jury, and verdict rendered for appellee.

Errors assigned are the overruling of appellant's de-

demurrers to the second and third paragraphs of answer, and overruling appellant's motion for new trial. If there

1. was error in overruling the demurrers to the special answers, it was harmless to appellant. It is urged by appellant that the consideration being contractual,
2. the written contract entered into on April 14 could not be varied by parol, to show a different consideration, or a want of consideration. In this the authorities support appellant. However, the court at the trial specifically and repeatedly refused to permit evidence of any negotiations between the parties prior to the making of the written contract of April 14, and no evidence was offered to show that there was a want of consideration for the contract. The record thus affirmatively shows that the overruling of the demurrers did not harm appellant. *Leonard v. City of Terre Haute* (1911), 48 Ind. App. 104, 115, 93 N. E. 872; *McFadden v. Schroeder* (1893), 9 Ind. App. 49, 35 N. E. 131; *Robinson & Co. v. Nipp* (1898), 20 Ind. App. 157, 50 N.

E. 408. Further, evidence of failure of consideration,

3. if admissible at all, could have been admitted under the general denial to plaintiff's complaint in this case, as well as under a special answer. As a general rule want of consideration must be pleaded in order to be available as a defense, yet where, as here, the complaint sets out the consideration for the contract sued on, and in addition makes the contract an exhibit, and the contract sets out the consideration, evidence of want of consideration is admissible under the general denial. *Nixon v. Beard* (1887), 111 Ind. 137, 141, 12 N. E. 131; *Butler v. Edgerton* (1860), 15 Ind. 15; *State, ex rel. v. Daly* (1911), 175 Ind. 108, 93 N. E. 539.

We now come to the consideration of the merits of the case as presented by the motion for new trial. The contract of April 14, 1910, was introduced in evidence, and

4. the court refused to allow any testimony as to what took place between the parties prior to the signing of

Smith v. Frantz—59 Ind. App. 260.

that contract, as all prior negotiations were merged in that contract, but he took the theory that the contract did not specify what crops could be raised in the year 1910, and that whatever was said and done by the parties to the contract after they entered into it, in order to show what construction they themselves placed on it, was proper; and if the parties understood and agreed that appellee was to raise a corn crop and hold possession of the buildings until March 1, 1911, he would have a right to gather the corn crop.

There was evidence to show that under the three-year lease which appellee held from the Ira F. Smith heirs, beginning September 1, 1908, he had the right to harvest the corn crop which should be on the farm the year of the termination of his tenancy, that he had paid \$500 cash rent for the year from September 1, 1909, to September 1, 1910, and that he had plowed part of the land on which he later raised the corn in suit, before the sale of the land to appellant on April 14, 1910. It also appears that appellant saw appellee planting and working the corn, and made no objection; that appellant came over and plowed a few rounds for appellee on two different days when he was plowing the ground; that he was frequently on the farm and saw the corn growing; that in September, 1910, he paid appellee \$40 for plowing ground and sowing wheat and made no claim for corn; that he made no objection and no claim of any kind until October 21, 1910, he and appellee had a dispute concerning appellee's right to the wood in suit, which he had cut; and even then it is shown from letters written by appellant to Howard F. Smith, one of the Smith heirs, the one who drew up the written agreement of April 14, that he was asserting no claim to the corn. Appellant finally went to an attorney to get advice about his rights and after that on November 30, 1910, made a demand for the corn. Howard F. Smith, who was a party to the contract of April 14 and who wrote the deed and the contract of April 14, at the request of the other parties said that it was his under-

standing, after the written contract was made, that Frantz was to have the corn crop in 1910. It was shown in evidence that appellant said to one of his grantors after the contract was made that he paid an awful big price, and he would not get anything off the farm for a year. Appellant introduced evidence contradicting some of the above, and he asserts that he was claiming the corn all the time after it was planted.

In this state of the issues and evidence the court gave the jury instruction No. 7, as follows: "If you should find by a preponderance of the evidence that the defendant in this case, with the knowledge and consent of the plaintiff, plowed, planted, raised and harvested the corn crop upon said premises as alleged in the complaint, and with the understanding that he had the right to do so, under a previous contract with the plaintiff's grantors, then and in that case, the defendant would have the right to such corn and there could be no recovery for the same." The court also refused to give appellant's requested instructions Nos. 1, 2 and 3, but gave them modified as his own instructions Nos. 9, 10 and 11. Instruction No. 11 is "If a tenant on a farm for a definite term plants a crop which can not be ripened and harvested before the expiration of his term, then the owner of the land is entitled under the law to such crop. If you find from a preponderance of the evidence that the defendant, at or about the time of the purchase by plaintiff of the farm of which he was a tenant, entered into a written contract with the plaintiff, and the former owners of said land whereby defendant agreed to surrender his lease to said farm on September 1, 1910, and after entering into said contract planted a corn crop which he knew could not ripen and be harvested before the said first day of September, 1910, then I charge you that said corn would be the property of the plaintiff and your finding should be for the plaintiff. Unless you further find that said corn was planted and harvested by said defend-

ant with the knowledge and consent, either express or implied, of the plaintiff, and with the belief and understanding of the parties, plaintiff and defendant, that the defendant had the right to plant, harvest and appropriate said corn.”

Instruction No. 10 was almost precisely similar to instruction No. 11, and instruction No. 9 told the jury that where parties enter into a written contract, providing and specifying particularly the rights and duties of each thereunder, such provisions exclude every other claim or duty not embraced within said contract, and that if the jury find from a preponderance of the evidence that defendant entered into a written contract with plaintiff and the Ira F. Smith heirs, or a part of them, whereby defendant agreed to surrender his lease to said farm on September 1, 1910, and reserved under said contract, the possession of the buildings, fruit, and pasture, together with rights relative to the clover seed, then defendant's rights on said farm after September 1, 1910, were limited and confined to the rights particularly enumerated in said contract, and if after entering into said contract defendant planted a crop of corn that could not be ripened and harvested before September 1, 1910, he did so at his peril and said corn growing on the farm on that day belonged to plaintiff, and if defendant thereafter gathered and appropriated the corn to his own use, such act of his would be a conversion of the corn, for which plaintiff could recover. “Unless,” etc., the last sentence being the same as the last sentence in instruction No. 11 above quoted, the court having modified these instructions merely by adding to each the same last sentence.

The giving of instructions Nos. 7, 9, 10 and 11 and the refusal to give instructions Nos. 1, 2 and 3, unmodified, is assigned as error and the consideration of the question presented by this error will dispose of all others in the case.

The contract of April 14, 1910, in evidence, and set out in the former part of this opinion, is not quite clear. Taken

according to the strict grammatical construction and punctuation, it states, not that the lease will be surrendered on September 1, 1910, but that the farm is known as the Ira F. Smith farm on September 1, 1910. Apart from this, it is evident that the instrument is rather crudely and hurriedly drawn, and no mention is made of what crops were to be raised during the year 1910. It is appellee's contention that the purpose of the contract was merely to permit appellant the right to the use of the farm in 1911, and the right to sow wheat in 1910, and that appellee was to have the right to harvest the corn raised by him in 1910. It seems that at the time of the trial all parties to the contract so understood it save appellant, and there is evidence to show that for several months immediately after the execution of the contract appellant also understood that the corn was appellee's.

It is said in 2 Elliott, Contracts §1537, "It is a familiar law that when a contract is ambiguous in its terms, a construction given to it by the parties thereto and by

5. their actions thereunder, before any controversy has arisen as to its meaning, with knowledge of its terms, is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts. The construction placed on the contract by parties thereto prevails when the language used will reasonably allow such construction even though the court would probably adopt a different construction were it not for the practical construction already placed by the parties on their agreement. The construction placed upon the contract by the parties themselves is of great value in determining its correct interpretation. The reason underlying this rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention." See, *Pate v. French* (1890),

Smith v. Frantz—59 Ind. App. 260.

122 Ind. 10, 23 N. E. 673; *Reissner v. Oxley* (1881), 80 Ind. 580; *Roush v. Roush* (1900), 154 Ind. 562, 55 N. E. 1017; *Indianapolis Cabinet Co. v. Herrman* (1893), 7 Ind. App. 462, 34 N. E. 579; *Smith v. Board, etc.* (1893), 6 Ind. App. 153, 33 N. E. 243; *Merchants, etc., Sav. Bank v. Frazee* (1894), 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. 341.

We think the contract before us is such that the court

4. was amply justified in allowing evidence to go to the jury of the construction placed on the contract by the parties, and in giving the instructions above set out and in refusing to give appellant's instructions Nos. 1, 2 and 3 unmodified. The evidence also fully supports the verdict.

Further, the courts have gone very far in holding that one who is the owner of land, but who allows a tenant under a previous owner to plant and cultivate crops, with-

6. out objection or assertion of any rights therein, has acquiesced in his right to harvest the crops and his ownership thereof, and is estopped to assert any claim thereto. If possible, the law allows the one who sows to reap. *Bowen v. Roach* (1881), 78 Ind. 361; *Carminie v. Bowen* (1906), 104 Md. 198, 64 Atl. 932, 9 Ann. Cas. 1135; *Opperman v. Littlejohn* (1910), 98 Miss. 636, 54 South. 77, 35 L. R. A. (N. S.) 707; *Moore v. Coughlin* (1912), 36 Okl. 252, 128 Pac. 257; *Bristow v. Garriger* (1909), 24 Okl. 324, 103 Pac. 596, 25 L. R. A. (N. S.) 451; *Kelley v. Todd* (1866), 1 W. Va. 197; *Whorley v. Karper* (1902), 20 Pa. Super. Ct. 347.

We find no error and the judgment is affirmed.

NOTE.—Reported in 109 N. E. 407. As to parol evidence to engraft a condition, limitation or reservation on a deed, see 1 Am. Dec. 44. As to the right of a landlord to growing crops where the tenant's estate is forfeited by his own act, see 15 Ann. Cas. 1033. As to the right of a tenant under a lease for a fixed period, to crops after termination of lease, see 9 Ann. Cas. 1139. See, also, under (1) 31 Cyc. 358; (2) 17 Cyc. 661; (3) 9 Cyc. 737; (4) 9 Cyc. 773; 24 Cyc. 916; (5) 9 Cyc. 588; 24 Cyc. 916; (6) 24 Cyc. 915.

BOES v. GRAND RAPIDS AND INDIANA RAILROAD COMPANY.

[No. 8,527. Filed March 12, 1915. Rehearing denied June 22, 1915.]

1. *APPEAL—Briefs.—Sufficiency.*—Where appellant's brief is so prepared that any member of the court may know from it alone, without reference to the record, the exact question which the court is called on to determine, it is sufficient, even though the exact letter of the rules have not been complied with in every respect. p. 274.
2. *APPEAL—Assignment of Errors.—Signature.—Sufficiency.*—Where the names of appellant's attorneys appeared below the assignment of errors in typewriting, instead of being signed by them in person, and the record disclosed that the same attorneys were appellant's attorneys in the lower court, the assignment was not open to attack on the ground that it was not signed. p. 274.
3. *RAILROADS.—Relief Associations.—Contracts.—Validity.*—Under §5308 Burns 1914, Acts 1907 p. 46, any contract of membership in a relief association maintained by a railroad company, whereby the member in any manner agrees to surrender or waive any right of damage against the railroad company on account of personal injury or death, is null and void; hence an answer setting up such a contract and the acceptance of benefits thereunder did not state facts constituting a defense to an action for damages to an injured employe. pp. 275, 276.
4. *APPEAL.—Questions Reviewable.—Rulings on Demurrers.—Memorandum of Defects.—Scope of Review.*—The court on appeal may look beyond the grounds stated in the memorandum of defects to uphold the action of the lower court in sustaining a demurrer, but it will not look beyond such grounds to overthrow the overruling of a demurrer. p. 276.
5. *PLEADING.—Demurrer to Answer.—Memorandum of Defects.*—Under §344 Burns 1914, Acts 1911 p. 415, a memorandum of defects must accompany a demurrer to an answer. p. 276.
6. *APPEAL.—Questions Reviewable.—Demurrer to Answer.—Validity of Contract.—Memorandum of Defects.—Sufficiency.*—Where defendant railroad company answered that plaintiff was a member of a relief association maintained by defendant and had accepted benefits on account of his injuries, etc., a memorandum of defects accompanying a demurrer to such answer, setting out that the contract relied on was void because it was an attempt by the company to exonerate itself by contract from the results of its own negligence, was sufficient to warrant the court in taking into consideration the provisions of §5308 Burns 1914,

Boes v. Grand Rapids, etc., R. Co.—59 Ind. App. 271.

Acts 1907 p. 46, relating to contracts of membership in railroad relief associations, in determining the sufficiency of such answer to withstand the demurrer. (*Stiles v. Hasler* [1914], 56 Ind. App. 88; *State, ex rel. v. Bartholomew* [1911], 176 Ind. 182; *Spiro v. Robertson* [1914], 57 Ind. App. 229; and *Blair Baker Horse Co. v. Railroad Transfer Co.* [1915], 59 Ind. App. 505, distinguished.) pp. 276, 278.

From Jay Circuit Court; *James J. Moran*, Judge.

Action by Orla F. Boes against the Grand Rapids and Indiana Railroad Company. From a judgment for defendant, the plaintiff appeals. *Reversed*.

John F. LaFollette and *Emerson McGriff*, for appellant.
Roscoe D. Wheat, for appellee.

HOTTEL, C. J.—Appellant filed in the trial court a complaint in one paragraph in which he sought to recover from appellee, damages for personal injuries alleged to have resulted from appellee's negligence. A demurrer to the complaint for want of facts was overruled. Appellee then filed an answer in three paragraphs, the first of which is a general denial, the second, a plea of payment, and the third, an affirmative answer setting up in detail facts showing that prior to appellant's employment by appellee, it, with its associated companies, had organized a relief department which it thereafter continuously maintained; that such department was organized and maintained for the benefit of injured and disabled employes of appellee, and its associated companies, the object and purpose of such relief department being to provide a fund out of which a definite amount should be paid to injured and disabled employes who contributed to such fund out of the wages earned by them while in the employ of appellee, and its associated companies, and, in the event of the death of any such employe a definite amount was to be paid to his relatives or beneficiaries named in his application. The answer also averred, in effect, that at the time appellant was employed

by appellee he signed an application to become a member of such relief department; that his application was accepted and that he was a member of such department in good standing when injured; that after his injury there was paid to him, on orders drawn by the treasurer of such department, benefits, to which he was entitled as a member thereof, amounting in the aggregate to \$196.50; that each of such orders was received by appellant and endorsed by him, and that he received and retained the money paid thereon. A copy of appellant's application for membership in said relief department, and the several orders on which said benefits were paid are each set out in the answer.

A demurrer was filed to this answer, accompanied by the following memorandum: "1. That said answer sets up an attempt on the part of the defendant to avoid Section No. 8020 of the Revised Statutes of 1908 of Indiana. 2. That said answer sets up and avers upon a contract that is in violation of section 8020 R. S. of 1908, and attempts to avoid said section of the Statutes. 3. That the contract set up in said third paragraph of answer is void for the want of mutuality. 4. Because it is without consideration. 5. That said contract is between this plaintiff and a voluntary relief association and defendant is not a party thereto. 6. Said contract is void because it is an attempt by the company to exonerate itself by contract from the results of its own negligence."

This demurrer was overruled and appellant filed a reply in two paragraphs, the first of which is a general denial. A demurrer to the second paragraph of reply was sustained, whereupon appellant withdrew his reply of general denial and elected to stand on his affirmative reply, and the court then rendered judgment for appellee, that appellant take nothing by his complaint, etc. From this judgment appellant appeals and assigns as error in this court: (1) the overruling of his demurrer to appellee's third paragraph

Boes v. Grand Rapids, etc., R. Co.—59 Ind. App. 271.

of answer; (2) the sustaining of appellee's demurrer to appellant's second paragraph of reply.

It is very earnestly insisted by appellee that no question is presented for our consideration by appellant's brief because of the failure to comply with the rules of the

1. court. Without indicating the several objections urged against such brief, it is sufficient to say that it not only evidences a good-faith effort to comply with such rules; but it does in fact substantially comply with them, when such rules are read in the light of the construction placed on them by both this court and the Supreme Court. The brief sets out in full, the complaint, the third paragraph of answer, the second paragraph of reply and the respective demurrers to each of such pleadings and the memorandum accompanying each respective demurrer, and indicates the respective rulings on each of said demurrers and the exceptions thereto, and the errors assigned and relied on for reversal. While it does not in every respect follow the exact letter of the rules, it is so prepared that any member of the court may know from it alone, without reference to the record, the exact question which the court is called on to determine, and hence, is sufficient to present such question. *Bishop v. Ross* (1914), 56 Ind. App. 610, 103 N. E. 505; *Joseph E. Lay Co. v. Mendenhall* (1913), 54 Ind. App. 342, 102 N. E. 974.

It is also insisted by appellee that the assignment of error is defective because not signed and for this reason presents no question. This contention is based on the fact

2. that the names of appellant's attorneys, viz., "La-Follette & McGriff, Attorneys for Appellant," which appears below such assignment of error is written with a typewriter instead of being signed by the attorneys in person. It is true, as appellee contends, that an assignment of errors is in the nature of a pleading, and should be signed by the party or his attorneys. *State, ex rel. v. Delano* (1870), 34 Ind. 52; *Thoma v. State* (1882), 86 Ind.

Boes v. Grand Rapids, etc., R. Co.—59 Ind. App. 271.

182; *H. B. Smith Co. v. Williams* (1902), 29 Ind. App. 336, 63 N. E. 318; *Rubey v. Hough* (1903), 161 Ind. 203, 204, 67 N. E. 257; *Ewbank's Manual* §131; §§364, 696 *Burns* 1914, §§358, 655 R. S. 1881. The authorities cited, however, do not go to the extent of holding that every pleading filed in a proceeding must be signed in the handwriting of the party or his attorney. In the case of *Hamilton v. State* (1885), 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491, the Supreme Court held that the name of a prosecuting attorney appearing on an indictment in print was a sufficient compliance with a statute requiring such indictment to be signed by such prosecuting attorney. See also, *Mezchen v. More* (1882), 54 Wis. 214, 11 N. W. 534; *Barnard v. Heydrick* (1866), 49 Barb. 62, 69; *Herrick v. Morrill* (1887), 37 Minn. 250, 33 N. W. 849, 5 Am. St. 841; *Brown v. Butchers, etc., Bank* (1844), 6 Hill. (N. Y.) 443, 41 Am. Dec. 755. It appears from the record in this case that LaFollette and McGriff were the attorneys of record below, and represented appellant in the proceedings there had. They are not questioning the validity of the signature to such assignment of errors, but are asserting its validity. Under such circumstances we think the fact of their names appearing below the assignment of errors in this court as the attorneys for appellant, though typewritten is a sufficient signing by them to withstand an attack of the character here made.

When we reach the merits of the question presented by this appeal we find that it is completely controlled and disposed of by the case of *Wells v. Vandalia R. Co.*

3. (1914), 56 Ind. App. 211, 103 N. E. 360. The answer to which appellant's demurrer was overruled was practically the same as in that case. The provisions of the rules and regulations of appellee's relief department and the application signed by appellant as set out in the answer in the instant case are substantially, if not identically, the same as those set out in the answer considered by this court in the case cited. However, it is very earnestly

Boes v. Grand Rapids, etc., R. Co.—59 Ind. App. 271.

insisted by appellee that this court is bound by the

4. memorandum filed with appellant's demurrer and can not look beyond the grounds therein stated in determining whether the court correctly ruled on
5. such demurrer, and that neither ground of such memorandum mentions §5308 Burns 1914, Acts 1907 p. 46, or attacks the contract set up in such answer because of its being in violation of such statute. Section 2 of the act of 1911 (Acts 1911 p. 415, §344 Burns 1914), as construed by this court applies to an answer and a memorandum must therefore accompany a demurrer to an answer. *Quality Clothes Shop v. Kecney* (1915), 57 Ind. App. 500, 106 N. E. 541. It is also true that while this court may look beyond the grounds stated in such memorandum to uphold a ruling of the trial court in sustaining a demurrer, it will not look beyond such grounds to overthrow a ruling of such court overruling a demurrer. *Bruns v. Cope* (1914), 182 Ind. 289, 105 N. E. 471.

It becomes necessary, under these holdings, for us to determine whether the grounds of appellant's demurrer to said answer will permit us to take into account §5308,

6. *supra*, before we may consider such section in determining the question presented by the ruling on said demurrer. It will be observed from the grounds of
3. such demurrer above set out that no reference is specifically made to such section of the statute. However, the sixth ground of the memorandum expressly challenges such answer on the ground that the contract relied on therein is void because "it is an attempt by the company to exonerate itself by contract from the results of its own negligence." Section 5308, *supra*, provides as follows: "That no railroad company now existing, or hereafter created, under and by virtue of the laws of this state or any other state or country, and having and operating a line of railway in this state, may establish or maintain, or assist in establishing or maintaining any relief association

or society, the rules or by-laws of which shall require of any person or employe becoming a member thereof to enter into a contract, agreement or stipulation, directly or indirectly, whereby such person or employe shall stipulate, or agree to surrender or waive any right of damage against any railroad company for personal injuries or death, or whereby such person or employe agrees to surrender or waive, in case he asserts such claim for damages, any right whatever, and any such agreement or contract, so signed by such person shall be null and void." It will be seen that this section, by its express language, renders void any contract of the character indicated in said sixth ground of appellant's memorandum, viz., any contract which attempts "to exonerate such a company from the results of its own negligence." While it is true that the trial court did not have its attention directly called to such section of the statute by such memorandum, yet, we are of the opinion that the ground of the memorandum indicated required the application of §5308, *supra*, to such answer in determining the question of its sufficiency. This being true the case, as hereinbefore stated, is controlled by the case of *Wells v. Vandalia R. Co.*, *supra*. On the authority of that case appellee's third paragraph of answer must be held insufficient and the judgment below reversed on account of the trial court overruling the demurrer thereto. This conclusion renders unnecessary a consideration of the ruling on appellee's demurrer to the second paragraph of reply. Judgment reversed with instructions to the trial court to sustain appellant's demurrer to appellee's third paragraph of answer and for such other proceedings as may be consistent with this opinion.

Caldwell, P. J., Ibach, Felt and Shea, JJ., concur.

Moran, J., not participating.

ON PETITION FOR REHEARING.

HOTTEL, J.—In a petition for rehearing it is very earnestly urged by appellee that this court erred in its original opinion in holding that the memorandum filed with the de-

6. murrer to the answer herein presented the question of the sufficiency of such answer under §5308 Burns 1914, Acts 1907 p. 46. It is claimed that the opinion in such respect runs counter to all other opinions, both of the Supreme Court and this court, rendered, either before or since, the opinion in the instant case was rendered. In support of this contention appellant cites: *Stiles v. Hasler* (1914), 56 Ind. App. 88, 104 N. E. 878; *State, ex rel. v. Bartholomew* (1911), 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914 B 91; *Spiro v. Robertson* (1914), 57 Ind. App. 229, 106 N. E. 726; *Blair Baker Horse Co. v. Railroad Transfer Co.* (1915), 59 Ind. App. 505, 108 N. E. 246.

The cases cited are easily distinguishable from the instant case. An examination of them will disclose that the memorandum involved in each attempted to point out in the pleading to which it was addressed some omitted fact or some infirmity in the pleading resulting from a defective or insufficient averment of fact, while in the instant case the grounds of the memorandum relied on are not grounds or objections based on the absence from the answer of any averment of a particular fact or facts, nor are such grounds based on the insufficiency of the averment of any particular fact or facts, but on the contrary, the grounds of the memorandum here involved are evidently intended to challenge the legality or validity of the contract on which the answer is based. The memorandum in either case must state the grounds of the objection to the pleading, but where the pleading is challenged because of the absence of a necessary averment or because of some infirmity in the manner of pleading, the trial court is entitled to have its attention specially called to the omitted averment or the particular

infirmity relied on, and the demurring party should not be permitted, under the statute in question, by the use of uncertain or ambiguous language in his memorandum, to cover up or conceal the real infirmity in the pleading of facts which he intends to present to the appellate tribunal; but where, as in this case, the ground of the memorandum challenges the pleading in its entirety because of the invalidity or the illegality of the contract on which it is based, such challenge is sufficient to present such question, without pointing out the particular statute on which such invalidity is based. The court being charged with the knowledge of the law, there could be no good reason for holding that a memorandum in such a case should point out the specific statute which rendered invalid the contract so challenged. Section 344 Burns 1914, Acts 1911 p. 415, does not require the demurring party to cite the statute or decisions on which he bases the ground of objection stated in his memorandum.

Where, as in this case, the trial court has its attention called to the invalidity of the contract on which the pleading is based, and the reason for its invalidity, §344, *supra*, has been substantially complied with and in such a case it would be a miscarriage of justice to permit a claim, otherwise meritorious, to be defeated by a contract made in violation of an express statute. The petition for rehearing is therefore overruled.

NOTE.—Reported in 108 N. E. 174; 109 N. E. 411 See, also, under (1) 3 C. J. 1409; 2 Cyc. 1913 Anno. 1013-36; (2) 3 C. J. 1352; 2 Cyc. 1002; 36 Cyc. 448; (3) 26 Cyc. 1096; (4) 3 Cyc. 223; (5) 31 Cyc. 316, 319; (6) 31 Cyc. 316.

Acton v. Baltimore, etc., R. Co.—59 Ind. App. 280.

**ACTON v. THE BALTIMORE AND OHIO SOUTHWESTERN
RAILROAD COMPANY.**

[No. 8,538. Filed April 14, 1915. Rehearing denied June 22, 1915.]

RAILROADS.—Relief Associations.—Recovery of Wages Applied to Dues.—A contract of membership in a railroad relief association entered into in 1909 in violation of §5308 Burns 1914, Acts 1907 p. 46, was null and void from its inception, so that the fact that the railroad company had applied wages withheld from plaintiff to the payment of his dues in such association was no bar to an action by plaintiff for the recovery of the wages so withheld; plaintiff having received no benefits from the association and having done nothing to operate as an estoppel.

From Martin Circuit Court; *James W. Ogdon*, Judge.

Action by Benjamin N. Acton against The Baltimore and Ohio Southwestern Railroad Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Frank Gilkison, for appellant.

W. R. Gardiner, C. K. Tharp, C. K. Gardiner and Edward Barton, for appellee.

IBACH, J.—This was a complaint against appellee, a railroad corporation, alleging "that the plaintiff did work and labor for the defendant at its special instance and request continuously from July 19, 1909, until July 19, 1911, at and for the agreed price of fifty-five dollars per month. That said defendant paid plaintiff for each of said months the sum of \$52.50, retaining of plaintiff's wages each month the sum of \$2.50, and retaining a total sum due plaintiff during said time of \$60.00, which sum of money is now due plaintiff and remains wholly unpaid."

The second paragraph of appellee's answer to this complaint set up that appellant was a member of a relief association maintained by appellee and associated corporations, that appellant, being an employe of appellee, on July 19, 1909, made application for membership in said association, and by the terms of his contract and admission was to pay

Acton v. Baltimore, etc., R. Co.—59 Ind. App. 280.

as dues to said association the sum of \$2.25 monthly, the same to be deducted out of his wages by appellee; that under his contract and the rules and regulations of said association, he was entitled to certain benefits if sick or injured, and that in case of accidental death a certain sum of money was to be paid to his beneficiary or next of kin, and also in case of natural death a smaller sum should be so paid, and provided for certain other benefits. That after appellant had continued in the service of appellee for two years, during which period he was entitled to the protection and benefits of the relief association, he quit its employment. The contract of membership in said association also recites "that in consideration of the contributions of said company to the relief department, and of the guarantee by it of the payment of the benefits aforesaid, the acceptance of benefits from the said relief department for injuries or death shall operate as a release of all claims against said company," and it was also provided in the regulations that benefits would not be paid under said contract of membership until a release for all claims for damages, from the member and all who might be entitled to a claim, should be filed with the superintendent of the relief department. It was averred in the answer that all the claim and demand of plaintiff in his complaint was for the amounts of dues retained by defendant under his contract of membership in said relief association, and for nothing more.

The chief error assigned is the overruling of appellant's demurrer to appellee's second paragraph of answer. The contract with the relief association alleged in this paragraph is in all essentials the same as the contracts considered in *Wells v. Vandalia R. Co.* (1914), 56 Ind. App. 211, 103 N. E. 360; and *Boes v. Grand Rapids, etc., R. Co.* (1915), ante 271, 108 N. E. 174, 109 N. E. 411, and upon the authority of those cases, such contract must be held null and void, according to the provisions of §5308 Burns 1914, Acts 1907 p. 46. Since the contract of membership in the relief association

Nagle v. Hirsch—59 Ind. App. 282.

was null and void from its inception, it follows that appellee had no right to retain a portion of appellant's wages, and apply it to the payment of dues in such association. There is no averment that appellant ever received any benefits from the association. There is nothing shown to estop him from recovering the moneys retained from him.

The court erred in overruling the demurrer to the second paragraph of appellant's answer, and for that error the judgment is reversed.

NOTE.—Reported in 108 N. E. 535. As to contracts of servant, in advance of employment, waiving right to recover for injuries due to master's negligence, see 44 Am. Rep. 633. As to the question arising under contracts requiring servants to elect between acceptance of benefits out of a relief fund and a prosecution of his claims, in an action for damages, see 11 L. R. A. (N. S.) 182; 48 L. R. A. (N. S.) 440. As to the right of a railroad company to maintain relief department as incidental to main business, see 4 Ann. Cas. 911. See, also, 26 Cyc. 1096.

NAGLE v. HIRSCH.

[No. 8,921. Filed March 3, 1915. Rehearing denied June 22, 1915.]

1. *WILLS.—Construction.*—A will must be construed as a whole and effect must be given to each particular clause thereof, unless some parts are conflicting and portions are against the manifest intention of the testator. p. 285.
2. *WILLS.—Construction.—Estate Devlscd.—Limited Life Estate.—Disposition of Remainder.*—A devise to testator's wife "for her maintenance and support during her life while she remains unmarried the use of all real estate owned by me at the time of my death", gave to her a limited life estate determinable before death only by the event of her remarriage, and the effect of the foregoing provision was not modified or changed by a subsequent clause in the devise that "all the real estate is to be divided equally between my son and daughter * * * after the death of my wife"; but the devise as a whole shows that it was the testator's intention to give the real estate to his children upon the death of his wife while his widow, or upon her remarriage; hence, on the election of the widow to take under the will, title vested in testator's children subject to her

Nagle v. Hirsch—59 Ind. App. 282.

right to the use and enjoyment during widowhood, whether terminated by death or remarriage. pp. 285, 287.

3. WILLS.—*Construction.—Words of Limitation.—Restraint of Marriage.*—Under a devise to testator's wife of the use of all of testator's real estate "for her maintenance and support during life while she remains unmarried", the use of the words "while she remains unmarried", is not in restraint of marriage and is not controlled by §3123 Burns 1914, §2567 R. S. 1881. p. 286.
4. WILLS.—*Election by Widow.—Effect.*—A widow's election to take under the will of her deceased husband is a relinquishment of all claims to testator's real estate other than that devised to her by the will. p. 287.

From Lake Superior Court; *Lawrence Becker*, Judge.

Action by Mary D. Nagle against Bertha Harvey Hirsch and another. From a judgment for the defendant named, the plaintiff appeals. *Reversed.*

L. V. Cravens and *P. R. Boylan*, for appellant.

Peter Crumpacker, *Fred Crumpacker* and *C. B. Tinkham*, for appellee.

FELT, J.—Appellant brought this action against appellee and William J. Harvey for partition of certain real estate in Lake County, Indiana. The court sustained a demurrer to each the second and fourth paragraphs of appellant's complaint and each of these rulings is assigned as error. The other paragraphs of complaint were dismissed.

In each of these paragraphs it is alleged that appellant and William J. Harvey are the "sole owners in fee simple as tenants in common of each of said parcels of real estate above described", but in each paragraph it is specifically charged that plaintiff (appellant) and the defendant William J. Harvey, are the children of Patrick Harvey, now deceased; that Patrick Harvey died testate in Chicago, Illinois, on July 22, 1897, and left surviving him, Bertha Harvey, his widow, and the two above mentioned children as his sole heirs at law. The will of Patrick Harvey, dated February 19, 1896, is as follows:

"I, Patrick Harvey of Chicago, Cook County, Illinois—Do hereby make this my last will and testament,

after the payment of all my debts, I give and bequeath to my wife, Bertha Harvey, all my personal property; also for her maintenance and support during her life while she remains unmarried the use of all real estate owned by me at the time of my death. If my wife, Bertha Harvey would prefer to take what she would be entitled by law, let it be done. If she does not do so, all the real estate is to be divided equally between my son and daughter William J. Harvey and Mary D. Nagle, wife Michael Nagle after the death of my wife."

It is furthermore averred that under the terms of the will Bertha Harvey (Hirsch) was entitled to the rents and profits and the use of the real estate "so long as she might remain unmarried"; that on August 21, 1908, Bertha Harvey intermarried with Herman Hirsch, and since that time she has not been entitled to any part of the rents or profits of said real estate; that the will was duly probated and appellee-elected to take under the will; that Patrick Harvey died the owner of certain parcels of land, including those set out and described in the complaint.

The memorandum accompanying the demurrer of appellee to each paragraph, in substance, suggests (1) that the facts averred show that said Nagle and William J. Harvey are remaindermen, and that partition "cannot be had between remaindermen, during the existence of a life estate"; that appellee has a life estate in the real estate in controversy; (2) it appears that said defendant Bertha Harvey Hirsch has a present and existing life estate in the real estate described in said complaint and as long as said estate is in existence, said plaintiff and said defendant William J. Harvey cannot quiet their title against her; (3) plaintiff is not shown to have such an interest as entitled her to maintain the suit; and (4) she has no interest in the real estate under the provisions of the will set out in the complaint.

Appellant dismissed as to William J. Harvey, and, refusing to plead further, elected to stand on the rulings on

the demurrers, and judgment was rendered that appellant take nothing by her complaint and against her for costs.

The questions presented depend for solution on the construction of the will of Patrick Harvey. Appellant contends that the will gave appellee a life estate, limited by the contingency of remarriage; that when she intermarried with Herman Hirsch she ceased to have any interest in the real estate; that the remainder at once vested in appellant and William J. Harvey as remaindermen under such will and that they were entitled to partition. On the other hand, appellee contends that the will gave her a life estate in the property and that partition will not be ordered during the existence of a life estate; that the language of the will, viz., "while she remains unmarried," imposes a condition subsequent in restraint of marriage upon the life estate devised to her and, under §3123 Burns 1914, §2567 R. S. 1881, is void. Other contentions are suggested but we state only the principal questions upon which the case depends.

What was the intention of the testator, Patrick Harvey, as evidenced by the language of the will? The will must be construed as a whole and effect must be given to

1. each particular clause thereof, unless some parts are conflicting and portions are against the manifest intention of the testator ascertained from a consideration of the will as a whole. *Skinner v. Spann* (1911), 175 Ind. 672, 684, 93 N. E. 1061, 95 N. E. 243. The first inquiry is as to the interest in the real estate given to the wife of the testator. The language, viz., "I give and bequeath to my wife, Bertha Harvey * * * for her maintenance and support during her life while she remains unmarried the use of all real estate owned by me at the time of my death," considered alone, plainly devises to her a limited life estate, or use of the property during widowhood, determinable before death only by the event of her remarriage. In *Summit v. Yount* (1887), 109 Ind. 506,

9 N. E. 582, our Supreme Court quoted approvingly from 4 Kent, Comm. 126, the following: "Words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate." In that case there was a devise to a wife of "all my estate both real and personal, so long as she remains my widow," and the court held the words "so long as she remains my widow," to be "in the strictest sense, words of limitation, and not of condition. Clearly and unequivocally, these words specify the widowhood of appellant as the utmost time of continuance of the estate to her." What was said in that case is equally true of the case at bar, for "widowhood" here as there, marks the utmost time of the continuance of the estate devised to the wife and there is no provision for termination of the estate during widowhood. See also, *Hibbits v. Jack* (1884), 97 Ind. 570, 49 Am. Rep. 478; *Wood v. Beasley* (1886), 107 Ind. 37, 7 N. E. 331, and cases cited; *Beatty v. Irwin* (1905), 35 Ind. App. 238, 242, 73 N. E. 926, and cases cited; *Harmon v. Brown* (1877), 58 Ind. 207.

It is contended that the testator first gave appellee a life estate, and by a later clause attempted to limit such estate. This contention cannot be sustained. The language does not indicate that a life estate was first granted, and then some limitation put upon it, but by a single sentence clearly indicates an intention to devise "maintenance and support" from the use of the real estate during widowhood.

As used in the will under consideration the words,

3. "while she remains unmarried" are not in restraint of marriage and the provision is not controlled by

§3123, *supra*. *Hibbitts v. Jack, supra*; *O'Harrow v. Whitney* (1882), 85 Ind. 140, 142; *Summit v. Yount, supra*.

The widow's election to take under the will operated as a relinquishment of all other claims to the testator's real estate other than that devised to her by the will.

4. *Beshore v. Lytle* (1888), 114 Ind. 8, 11, 16 N. E. 499; *Ragsdale v. Parrish* (1881), 74 Ind. 191; *O'Harrow v. Whitney, supra*.

It is averred that the widow elected to take under the will. The clause of the will, viz., "all the real estate is to be divided equally between my son and daughter

2. William J. Harvey and Mary D. Nagle, wife of Michael Nagle after the death of my wife," presents an important question as to its effect on the preceding provisions of the will. The clause last quoted provides for the disposition of the remainder of the testator's estate in the land after the termination of the estate therein devised to his widow. When considered in connection with the other provisions of the will it is apparent it was not intended to modify or change the provision which gives the wife support and maintenance from the real estate during widowhood. The evident intention of the testator was to provide that in case the wife accepted the provisions made for her in the will, upon her death during widowhood, the possession, use and enjoyment of all the real estate was to come to the other devisees, or remaindermen, named in the will. In case her widowhood was terminated by her remarriage the same results would follow, only the event would be thereby accelerated.

The estate of the wife is clearly defined, and there is no indication anywhere in the will of an intention to make it other than a means of support while she remained unmarried. The language employed in the latter clause does not specifically devise the remainder, but is sufficient to show the intention of the testator to give the real estate to

his children named therein upon the death of his wife while his widow, or upon her remarriage. This construction gives effect to all the provisions of the will upon either contingency. While the latter clause does not expressly provide for the distribution of the remainder upon the remarriage of the testator's widow, the intention that it should be so distributed upon the happening of that event is readily deducible from the whole will without doing violence to the language employed. *Skinner v. Spann, supra*. When the widow elected to take under the will, the title to the real estate in controversy vested in appellant and William J. Harvey, subject to appellee's right to the use and enjoyment thereof during widowhood, whether terminated by death or remarriage. *Rush v. Rush* (1872), 40 Ind. 83, 88; *Heilman v. Heilman* (1891), 129 Ind. 59, 62, 63, 28 N. E. 310; *Corey v. Springer* (1894), 138 Ind. 506, 509, 37 N. E. 323; *Wood v. Robertson* (1888), 113 Ind. 323, 324, 15 N. E. 457; *Davidson v. Bates* (1887), 111 Ind. 391, 398, 12 N. E. 687.

In *Rush v. Rush, supra*, the testator devised to his wife certain lands during widowhood. The will also provided as follows: "I give and bequeath to my son, Thomas E. Rush, at the death of my wife, Sally Rush, provided he takes care of her during her natural life, fifty acres." The widow survived the testator several years and did not remarry. The court held that the son took a freehold interest in remainder, upon condition, which vested in him upon the death of the testator and the acceptance of the devise by the devisee. The enjoyment of the estate devised to the son was to begin in the future upon the death of his mother, provided he had complied with the condition subsequent of caring for her during her natural life. There was a finding that he had complied with all the conditions which the widow and mother had not waived, and the court held that he took the estate under the provisions of the will. In the course of the opinion, it is said the devise to the wife was

only during widowhood and might have terminated by her remarriage "and in that event the title, during the interim between her marriage and death, would have reverted to the heirs." But inasmuch as there was no remarriage the latter proposition, though correct, was unnecessary to a decision of that case. The will in that case differs from the one in this with respect to the condition subsequent upon which the son's enjoyment of the estate devised to him depended. In that case there was a necessity for deferring the son's enjoyment of the estate until the death of his mother, because of the condition which required him to care for her during life. There is no such condition in the devise to the children in the will under consideration. Keeping in mind the difference in the provisions of the two wills and the questions necessarily decided in the Rush case, it supports our conclusion in the case at bar.

But, if it be said that the latter clause of the instrument will not bear the construction given it, we should then be compelled to hold that there was partial intestacy in the failure to provide for a disposition of the remainder of the estate in the event of the remarriage of the widow, during the period of time intervening her remarriage and death. In that event the widow would have received all the will gave her, and with her interest out of the way the law would give the whole of the remainder of the estate to the two children named in the will, and the same ultimate result would be reached as that obtained by the foregoing construction of the will, which seems warranted and avoids intestacy. *Rush v. Rush*, *supra*; *Stilwell v. Knapper* (1880), 69 Ind. 558, 565, 35 Am. Rep. 240; *Hawk v. McComes* (1884), 98 Ind. 460, 465; *Beshore v. Lytle*, *supra*; *Waugh v. Riley* (1879), 68 Ind. 482, 489; *Thompson v. Turner* (1910), 173 Ind. 593, 597, 89 N. E. 314, Ann. Cas. 1912 A 740. It follows from the foregoing propositions that the court erred in sustaining the demurrer to each of said para-

Sovereign Camp, etc. v. Latham—59 Ind. App. 290.

graphs of complaint. The judgment is therefore reversed with instructions to overrule the demurrer to each of said paragraphs of complaint, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 108 N. E. 9. As to conditions in wills in restraint of marriage, see 4 Am. Dec. 114; 80 Am. Dec. 493. As to the validity of a testamentary disposition in restraint of marriage, see 5 Ann. Cas. 138; 9 Ann. Cas. 1143. See, also, under (1) 40 Cyc. 1413; (2) 40 Cyc. 1622, 1619, 1413; (3) 40 Cyc. 1702; (4) 40 Cyc. 1988.

SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD v. LATHAM.

[No. 8,376. Filed February 18, 1915. Rehearing denied May 14, 1915. Transfer denied June 22, 1915.]

1. INSURANCE.—*Fraud in Settlement With Beneficiary.—Action for Damages.—Requisites.*—To sustain a judgment for plaintiff in an action against an insurer for damages on account of alleged fraud in making settlement under a policy in which plaintiff was the beneficiary, it must first appear that there was a valid contract of insurance on which defendant was liable, and, second, that the settlement was induced and procured by fraud to the resulting damage of plaintiff as alleged. p. 294.
2. INSURANCE.—*Mutual Benefit Insurance.—Contracts.—Constitution and By-Laws.*—Where the constitution and by-laws of a fraternal organization are by the terms of the application made a part of the certificate, they, with the certificate, constitute the contract of insurance. p. 295.
3. INSURANCE.—*Mutual Benefit Insurance.—Warranties in Application.—Effect of False Statements.*—Where the application for insurance provides that the representations and answers therein are warranted to be true, and the certificate issued thereon provides that if such representations or answers are in any respect untrue the certificate shall be null and void, it is essential, in order that the contract of insurance may not thereby be rendered voidable, that such representations and answers be true in every respect, regardless of the apparent materiality or immateriality thereof. p. 295.
4. INSURANCE.—*Mutual Benefit Insurance.—Warranties in Application.—Breach.*—Where the applicant for insurance in a fraternal society stated in his application that he had never been afflicted

with dropsy, scrofula, rheumatism, chronic catarrh, syphilis or insanity, and by its terms expressly warranted that he was of sound bodily health and mind, and stated on the certificate over his signature that he had read the certificate and warranted himself to be in good health at the time, answers by the jury to interrogatories showing that insured had had syphilis prior to the application, that at the time he was of unsound mind, etc., being supported by the evidence, showed such a breach of the warranty contained in the application as to render the contract void, in the absence of anything showing a waiver of the breach or an estoppel from asserting it. p. 295.

5. INSURANCE.—*Mutual Benefit Insurance.*—*Warranties in Application.*—*Breach.*—*Waiver.*—*Knowledge of Local Officer.*—Where the clerk of the local camp of a fraternal insurance society, authorized to solicit and receive applications, was charged by the society's by-laws with the duty of collecting all moneys due the camp and locally due the sovereign camp, etc., evidence showing that on the day of the date appearing on the certificate issued to plaintiff's husband such clerk heard a conversation by decedent in which decedent disclosed exaggerated notions concerning his business, that within a few days thereafter such clerk was informed by decedent's brother that decedent had been committed to the insane hospital because of paresis which resulted from syphilis which decedent had contracted early in life, and that such clerk then advised the brother that the certificate was valid, and thereafter advised plaintiff that the certificate was valid and would be paid at decedent's death if the dues were kept paid, etc., together with evidence that the dues were paid, and other evidence sufficient to charge defendant with the duty of inquiry as to decedent's condition at the time of his application, was sufficient to show a waiver of a breach of the warranty in the application as to decedent's health, and to estop defendant from asserting the invalidity of the certificate, notwithstanding a provision of its by-laws that no agent or officer had power or authority to waive same. pp. 297, 301.
6. INSURANCE.—*Mutual Benefit Insurance.*—*Authority of Local Officers.*—*Knowledge.*—*Presumptions.*—An officer of the local camp or lodge of a fraternal insurance society, who is charged with the duty of collecting assessments and remitting them to the supreme organization, is the agent of the latter, and knowledge required by him in the performance of such duty is the knowledge of his principal, since it is conclusively presumed that knowledge so acquired is communicated by him to the principal. p. 301.
7. INSURANCE.—*Mutual Benefit Insurance.*—*By-laws.*—*Waiver.*—A provision in the by-laws of a fraternal insurance society that no

- officer or agent has the power or authority to waive any of the provisions thereof or any of the conditions upon which certificates are issued, may be waived the same as any other provision of the by-laws or condition of the certificate. p. 302.
8. **INSURANCE.—*Mutual Benefit Insurance.—Validity of Certificate.—Informalities Attending Issue.***—Informalities attending the issuance of the certificate sued on, consisting of an omitted signature to a printed statement that the applicant had made required payments and had been introduced as a member, and a failure to introduce or initiate the applicant, even if material to the validity of the certificate, must be deemed waived in view of evidence showing that the certificate was delivered, that all preliminary payments were made, that the dues and assessments were thereafter collected with full knowledge of the facts, that the insured was at all times treated as a member, and that after his death the certificate was taken up by the society for the purpose of making settlement, etc. p. 303.
9. **APPEAL.—*Review.—Findings.—Conclusiveness.***—Where the evidence, though by no means conclusive, was sufficient to make a case for the jury on the question of alleged fraud in procuring settlement with the beneficiary under a certificate on the life of her deceased husband, the finding of the jury thereon can not be disturbed. p. 305.
10. **INSURANCE.—*Fraud in Settlement With Beneficiary.—Measure of Damages.—Instructions.***—In an action to recover damages on account of fraud practiced on the beneficiary in making settlement under a certificate issued by defendant, the measure of damages is the difference between the amount received in the settlement and the actual value of the thing surrendered, so that an instruction placing the measure as the difference between the amount paid and the face value of the certificate, to which the jury could not add interest, was erroneous. p. 306.
11. **APPEAL.—*Review.—Harmless Error.—Instructions.***—Error in giving an erroneous instruction as to the measure of the damages recoverable can not work a reversal, even though the excessiveness of the damages was assigned as cause for a new trial, where appellant has waived such cause for new trial by failure to discuss it in the brief. p. 307.
12. **NEW TRIAL.—*Argument in Support of Motion.—Discretion of Court.***—The right to be heard in argument in support of a motion for new trial does not exist under the practice, and the question of the necessity or advisability of such argument is for the trial court. p. 308.
13. **APPEAL.—*Review.—Ruling on Motion for New Trial.—Waiver of Objections.***—Where it does not in any manner appear that appellant objected to the trial court disposing of the motion for new

Sovereign Camp, etc. v. Latham—59 Ind. App. 290.

trial without hearing argument thereon, appellant can not be heard to make such objection on appeal. p. 308.

From Superior Court of Marion County (71,596); *Vinson Carter*, Judge.

Action by Mattie R. Latham against the Sovereign Camp of the Woodmen of the World. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Ralph Bamberger, Isidore Feibleman and A. H. Burnett, for appellant.

Newton J. McGuire, for appellee.

CALDWELL, P. J.—This is an action brought by appellee, as the beneficiary of an insurance certificate issued by appellant, a fraternal insurance organization, on the life of Walter D. Latham, appellee's husband. The certificate was issued under date of November 9, 1903. The insured died April 24, 1905, and a controversy arising respecting the validity of the certificate, a settlement was effected by which appellant paid appellee the sum of \$300, in consideration of the surrender and cancellation of the certificate. The suit was prosecuted to recover damages for alleged fraud and deceit in inducing and procuring such settlement. If the certificate was valid and in force, appellant's liability thereon was in the sum of \$1,500. The verdict fixed appellee's damages at \$1,668, for which sum judgment was entered. The questions presented arise under the motion for a new trial.

Appellee by her complaint alleges the issuing of the certificate; that the insured complied with all the requirements and performed all the conditions of the contract of insurance by him to be performed; admits that the insured made certain false answers in his application; avers that appellant with full knowledge of the facts, not only accepted and retained premiums and stated dues paid, but also induced the payment thereof by means of representations and assurances that notwithstanding such false answers, the certificate was valid and in force. The facts constituting the alleged fraud

and deceit by which such settlement was procured are specifically averred.

Appellant answered in nine paragraphs. The first is a general denial; the second payment; the fourth that the maximum liability under said certificate was \$1,500; the third, sixth, seventh and eighth plead in various forms the existence of a controversy respecting appellant's liability under said certificate, and a compromise, settlement and accord and satisfaction, in the absence of fraud, by the payment of \$300, which appellee retained; the ninth paragraph pleads a section of appellant's constitution, by the terms of which the consul commander of the local camp was shown not to have authority to waive any of the conditions or requirements of the contract of insurance; the fifth paragraph, that by insured's written application, alleged to be a part of the contract, he warranted that he had never been afflicted with insanity, chronic catarrh, rheumatism, syphilis, dropsy, or scrofula, and that at the time of making such application and when the certificate was delivered to him, he was sound in body and mind, and that he then had no diseases that tended to shorten his life; that said answers and warranties were false in that the insured had had all said diseases, and that at the time of making said application and when said certificate was delivered to him, he was in poor physical health and then had diseases which tended to shorten his life, and that at said times, he was of unsound mind; that appellant accepted said application and delivered said certificate in ignorance of said facts; that by the terms and conditions of said certificate, the fact that said answers and warranties were false rendered the certificate void.

Appellee replied to all the paragraphs of answer except the first and fourth. The pleadings are not challenged.

The first question presented is respecting the suffi-

1. ciency of the evidence. In order that the judgment in appellee's favor may be sustained, it must appear, first, that there was a valid contract of insurance on which

appellant was liable, and second, that said settlement was induced and procured by fraud, to the resulting damage of appellee as alleged. We proceed to consider these questions in the order stated.

By the terms of the application and the beneficiary certificate issued thereon, such application and the constitution and by-laws of the fraternity are made parts of the

2. certificate, and consequently, they, with the certificate, constitute the contract of insurance. *Supreme Lodge, etc. v. Graham* (1912), 49 Ind. App. 535, 97 N. E. 806. The application provides that all statements,

3. representations and answers contained therein are warranted to be true. The fourth specification of the certificate, as exhibited with the fifth paragraph of answer, and in so far as it is material here, is as follows: "If any of the statements or declarations in the application for membership, and upon the faith of which this certificate was issued, shall be found in any respect untrue, this certificate shall be null and void and of no effect, and all moneys which shall have been paid, and all rights and benefits which have accrued on account of this certificate shall be absolutely forfeited without notice or service." The insured's statements, representations and answers to questions, as contained in the application and certificate are by each of said instruments expressly made warranties. Such being the case, it is essential, in order that the contract of insurance may not thereby be rendered voidable, that such statements, etc., be true in every particular, and regardless of the apparent materiality or immateriality of the subject-matter thereof. *Catholic Order, etc. v. Collins* (1912), 51 Ind. App. 285, 99 N. E. 745.

Under the issues here, the only statements made by the insured that are important are the following: In the application, he stated, in answer to questions, that he had

4. never been afflicted with dropsy, scrofula, rheumatism, chronic catarrh, syphilis, or insanity. The application contains also the following: "I hereby certify, agree

and warrant that I am of sound bodily health and mind; * * * have no injury or disease that will tend to shorten my life." The certificate contains the following signed by the insured: "I have read the above certificate * * * and warrant that I am in good health at this time." The foregoing are the only statements that are material here, for the reason that the issues present no others for our consideration.

There was no evidence that the insured had been afflicted with dropsy or scrofula. By answers to interrogatories returned with the general verdict, the jury found that the insured, prior to said application, had not had chronic catarrh or rheumatism. The evidence does not show that he was at any time afflicted with chronic catarrh. There was direct testimony given by nonexpert witnesses that he had had rheumatism prior to said application. However, the testimony of certain expert witnesses on the subject of the causes, nature and symptoms of rheumatism, involves in doubt the question of whether such was in fact the nature of the ailment under investigation. It was, therefore, within the province of the jury to determine whether such affliction was rheumatism. As indicated, the jury found in the negative on that subject. By the answers to interrogatories, the jury also found that the insured had had syphilis prior to October 22, 1903, being the date of such application, and that on said date, he was of unsound mind; also that on said date, he was not in good mental and physical health, and that he was insane on November 9, 1903, being the date of said certificate, and that appellant knew prior to the time when it received proofs of the death of insured the facts aforesaid respecting such mental and physical infirmities. The interrogatory in response to which the jury answered that the insured was not in good mental and physical health on October 22, is so worded that if either his mental or physical health was impaired, the interrogatory is satisfied. The contract here, as well as the interrogatories, treats insanity

as a mental disease. The evidence sustains the finding respecting the prior existence of syphilis and also the existence of said mental infirmity at the times indicated. There was evidence that ten or fifteen years prior to making said application, the insured contracted said physical disorder. There was no evidence that the insured was afflicted with said disease or with any other purely physical infirmity at the time of making such application or on the date of the certificate, but there was evidence that at each of said times he had a mental disorder in the form of paresis, and that such mental disorder was caused by such prior physical disease. On November 26, 1903, the insured, pursuant to an insanity inquest, was committed to the Central Hospital for the Insane, where he died April 24, 1905, as the result of a dislocated neck, caused by falling down a stairway. The fact of the prior existence of such physical disease and of such mental disorder at the time of making such application and when such certificate was delivered, constituted such a breach of the warranty contained in the application and beneficiary certificate, as to render the contract of insurance void, at the election of appellant, and we should be compelled so to hold, unless it may also be held that appellant waived such breach of warranty or is estopped from asserting it.

We proceed to consider the question of waiver, or what is practically its equivalent, the question of estoppel, as applied to the facts of this case. Appellant is a fraternal

5. beneficiary association, incorporated under the laws of Nebraska. It is composed of a sovereign camp, beneficiary head camps, head camps and camps. One of such camps, known as Pioneer Camp No. 1 was located at Indianapolis, being the camp to which the insured made application, and through which such certificate was issued. Such local camp was authorized by the "constitution, laws and by-laws" of the association to solicit and receive applications for beneficiary membership. Among the officers of such local camp was one designated as clerk. By such "constitution, laws,

and by-laws" it was made the duty of the clerk to collect and receive all moneys due the local camp, and locally due the sovereign camp, including camp dues, entrance or admission fees paid by the applicant for insurance at the time of making such application, also the monthly assessments made against the holders of beneficiary certificates to pay death dues, and also the extra assessments made to that end. He was charged with the duty also of remitting to the sovereign clerk all moneys due the sovereign camp from the local camp on account of such collections, including such assessments, for all which services the clerk received a stated compensation. Section 69 of the "constitution, laws and by-laws" is in part as follows:

"No officer, employe, or agent of the sovereign camp, or of any camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this constitution or of these laws."

Appellant, ascribing to such provision the force and effect of a by-law, states thereon in its brief, point 13, as follows: "The appellant by its by-laws, limited the power of its officers and agents with reference to the waiving of forfeiture of the policy, and prohibited such waiver, and the appellee is charged with knowledge of this limitation and is bound thereby, so that she may not rely upon the acts of the local clerk, which might otherwise have created an estoppel or amounted to a waiver."

There was evidence that on November 27, being the day after the insured was taken to the hospital, the insured's brother, at the request of appellee, called on the camp clerk to inquire about the validity of the contract of insurance. At that time the brother informed the clerk that the insured was insane, and that he had been taken to the insane hospital; that his mental ailment had been pronounced paresis; that he had had syphilis early in life, and that his present trouble had resulted from said early disorder. Under such

circumstances, the brother inquired of the clerk respecting the validity of the certificate, and whether or not appellee had better keep up the payments. The clerk advised the brother in substance that the certificate was valid, and that the payments be made.

It is admitted that appellee paid all assessments and dues on account of such certificate during the remaining life of the insured. There was evidence that at the maturity of the first assessment after the insured was declared insane, appellee sought the counsel of the clerk respecting the validity of the certificate under the circumstances, and that she was informed by him that the assured was in good standing, his certificate valid, and that if she kept up the payments the company would pay her the amount of the certificate at the death of the insured. Appellee, in reliance on such assurances, made the payment. Such assurances were repeated at the times when several other payments were made. There was, then, evidence that the clerk not only accepted, but also induced payments month after month from November, 1903, to April, 1905, with full knowledge on November 27, 1903, and thereafter that prior to said application the insured had had syphilis, and that as a result thereof, he was on and after said date of unsound mind. It follows that the clerk accepted and induced said payments with knowledge that there had been a breach of warranty respecting such physical disease. We have indicated that there was no evidence that the insured was not in good physical health at the time of making said application, and when said certificate was issued and delivered. In making such statement, we are not treating paresis as a physical infirmity. There was evidence, and the jury found that the insured was insane at each of said times. There was no direct evidence that the clerk had any knowledge that the insured was insane or that he was afflicted with paresis until he received information to that effect on November 27. However, the clerk, in his testimony, stated that he was present at a conversation had by the insured on the

evening of November 9, 1903, being the date of the certificate, with a number of members of the camp, in front of the hall where the camp met; that the insured stated that he was selling coffee to families from house to house, and that he had sold thousands of pounds that day; that he wanted to hire the persons present to help him sell coffee. The clerk testified that he thought at the time that the insured was simply bragging. The clerk, within a little more than two weeks after this occurred, had positive knowledge that the insured had been adjudged insane, and committed to an asylum. The only marked characteristic of the insured's mental aberration was his exaggerated ideas respecting the amount of business he was doing and the money he was making, and specifically respecting the amount of coffee he was selling. A number of persons who testified as witnesses, narrated incidents similar to that to which the clerk testified, and as happening shortly before the date of the application, and between that date and the date of the certificate and perhaps thereafter, and gave it as their opinion that the insured was of unsound mind at the respective times of such incidents. It would seem to follow that had inquiry been made by the clerk on or after November 27, such inquiry would have led to information that the insured was of unsound mind at the date of such application and also of such certificate. It would seem also that the circumstances were sufficient to provoke such inquiry. "Where one has knowledge of facts sufficient to excite the attention of a person of ordinary prudence and to put him on further inquiry, he is required to make such inquiry in good faith and with diligence, and, in the absence of so doing, he will be chargeable with the knowledge of the particular point or fact which such inquiry would have revealed or imparted." *Webb v. John Hancock, etc., Ins. Co.* (1903), 162 Ind. 616, 635, 69 N. E. 1006, 66 L. R. A. 632. See, also, *Blair v. Whittaker* (1903), 31 Ind. App. 664, 69 N. E. 182; 29 Cyc. 1113.

We hold that there was evidence to justify the jury in

finding that the clerk at the time when he was receiving payments of said assessments was chargeable with knowledge that the insured was of unsound mind when he made said application and when said certificate was issued, and with knowledge of the consequent breach of warranty, and in view of the general verdict, it will be presumed that the jury did so find. It follows that were said clerk the insurer and the party appellant here, the facts are sufficient to charge him with a waiver of said breaches of warranty, and to estop him from asserting the invalidity of the contract of insurance. We are then confronted with the question of whether there was such a relation between said clerk and the appellant as that the same results follow as against the latter. On this question, it would be a hopeless task to undertake to harmonize the conflicting decisions of the various states, and especially in view of the fact that the association involved here is in the nature of a fraternal beneficiary company, rather than a stock company. However, in this State, it seems to be settled in matters involving such insurance

6. companies that an officer of a local camp or lodge, who is charged with the duty of collecting assessments and remitting them to the supreme or sovereign organization, is the agent of the latter; that knowledge acquired by him in the performance of such duty is the knowledge of his principal, for the reason that it is conclusively presumed that he communicated such knowledge to his principal. *Farmers Mut. Fire Ins. Co. v. Jackman* (1905), 35 Ind. App. 1, 73 N. E. 730; *Supreme Court, etc. v. Sullivan* (1901), 26 Ind. App. 60, 59 N. E. 37. By recourse to the foregoing propositions, we have here a situation where appellant, with

5. knowledge of the existence of facts and circumstances constituting a breach of warranty, as indicated, failed to elect to declare the contract of insurance void, or to forfeit all rights of the insured and beneficiary thereunder, but on the contrary, with knowledge aforesaid, collected and retained assessments for about sixteen months. Under such

circumstances, it must be held that appellant at the decease of the insured had waived said breaches of warranty, and was estopped to assert the invalidity of the contract of insurance. See *Supreme Tribe, etc. v. Lennert* (1912), 178 Ind. 122, 131, 98 N. E. 115; *Supreme Tent, etc. v. Volkert* (1900), 25 Ind. App. 627, 643, 57 N. E. 203; *Brotherhood, etc. v. Moore* (1905), 36 Ind. App. 580, 76 N. E. 262; *Supreme Court, etc. v. Sullivan, supra*; *Farmers Mut. Fire Ins. Co. v. Jackman, supra*; *Dromgold v. Royal Neighbors* (1913), 261 Ill. 60, 103 N. E. 584; *Modern Woodmen, etc. v. Breckenridge* (1907), 10 L. R. A. (N. S.) 136, note. See, also, *Trotter v. Grand Lodge, etc.* (1906), 132 Iowa 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533, where the decisions are collected and reviewed. See, also, authorities *pro* and *con* cited in 2 Bacon, Ben. Soc. and Life Ins. (3d ed.) §434a.

The fact that appellant's laws provided that no officer, employe or agent of the Sovereign Camp or of any camp, has the power, right or authority to waive any of the

7. provisions thereof or any of the conditions upon which certificates are issued, is not controlling. On this subject, this court in *Union, etc., Ins. Co. v. Whetzel* (1902), 29 Ind. App. 658, 665, 65 N. E. 15, said: "The stipulation in the policy that none of its terms could be modified or changed except in a specified manner could itself be waived by the company either expressly or by the conduct of the company. * * * Although a policy may provide that an agent shall have no power to waive a forfeiture, yet the company may estop itself, by its conduct, from denying the grant of such powers to him." See, also, *Farmers Mut. Fire Ins. Co. v. Jackman, supra*, 15; *Supreme Court, etc. v. Sullivan, supra*. *Dromgold v. Royal Neighbors, supra*, deals with a fraternal beneficiary society of the general nature of appellant here. In that case, one of the laws of the company, very similar to §69 above quoted, was involved. There the court said: "Restrictions upon the power of an agent of an

insurance company to waive any of the conditions of the contract or upon the manner of such waiver are themselves conditions of the contract, which may be waived the same as any other condition of the policy. * * * It has been held by this court that the doctrine of waiver applies not only to insurance companies having a capital stock, insuring for pecuniary benefit, but also to mutual benefit associations. * * * The nature and objects as well as the organization and government of such associations render the application of general rules of law in most cases the same in mutual benefit associations not organized for pecuniary profit as in insurance societies organized for pecuniary profit." See, also, *Majestic Life Ins. Co. v. Tuttle* (1915), 58 Ind. App. 98, 107 N. E. 22; *Modern Woodmen, etc. v. Coleman* (1902), 64 Neb. 162, 89 N. W. 641; *Pringle v. Modern Woodmen, etc.* (1906), 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; *Shotliff v. Modern Woodmen, etc.* (1903), 100 Mo. App. 138, 73 S. W. 326.

It is urged that said certificate was invalid on account of informalities attending its issue. The facts are as follows:

Section 51 of appellant's laws provides that all beneficiary certificates shall be signed by certain officers of the sovereign camp, attested by the corporate seal, and countersigned by the consul commander and clerk of the local camp. Section 55 provides that the clerk shall not accept any payments except entrance fees, from an applicant until the certificate has been so countersigned. Section 58 provides that liability of the sovereign camp on a certificate shall not begin until the certificate has been issued and delivered, certain payments made, and the applicant obligated or introduced by a camp or an authorized deputy in due form. The informality is as follows: (1) The certificate contains a printed statement that the applicant has made all payments required, and has been introduced as a member of the camp. Under date of November 9, 1903, this statement is signed by the consul commander, but is not signed by the clerk. It

was issued under the seal of the camp, and bears the signature of the clerk as a witness to the signature of the insured to the warranty features of the certificate. (2) The clerk testified, without contradiction, that the insured was not initiated or introduced to the camp on the evening of November 9, or at any subsequent meeting. There was evidence that the consul commander took possession of the certificate on the evening of November 9, and some evidence that he was a "deputy". There was no evidence whether the insured was "obligated and introduced" by an authorized deputy. Assuming that these irregularities are material, then, as indicated, it is conceded that the certificate was delivered and that it was thereafter in the possession of the insured or the beneficiary; that all preliminary payments were made, and all assessments and dues paid; the insured was at all times treated as a beneficiary member of the camp. The clerk collected assessments and remitted them to the sovereign camp, with full knowledge of said irregularities. After the decease of the insured, the clerk took possession of the certificate with the representation that it was necessary in order that appellee might receive her money thereon. He required her to make proof of the death, and collected from her \$5 to pay the expense of the same. Are these facts sufficient to show a waiver of such informalities? The decisions apparently are not uniform on this question. In *Caywood v. Supreme Lodge, etc.* (1908), 171 Ind. 410, 86 N. E. 482, 131 Am. St. 253, 23 L. R. A. (N. S.) 304, 17 Ann. Cas. 503, the certificate as a condition to its validity required that it be countersigned by certain officers. It appearing that the certificate had not been so countersigned, the court held it to be invalid, saying, however: "It may be that the requirement that the same be countersigned by some person or persons named, may be waived by the company, but there can be no presumption from the mere possession thereof, when it has not been countersigned in the manner required." This language was used in passing on the sufficiency of the com-

plaint, which was held to be bad, among other reasons, because it contained no averments showing such a waiver. In *Wagner v. Supreme Lodge, etc.* (1901), 128 Mich. 660, 87 N. W. 903, a by-law required an initiation as a condition to the delivery of the policy. Where such formality had been omitted, the court said: "When, in the absence of fraud a policy of insurance is issued in violation of such provisions of the by-laws, those provisions are waived and the policy is valid. * * * The issue of a certificate is evidence that prior conditions have been complied with, or, if not complied with, that they have been waived; and, in the absence of fraud, it is proof of the member's good standing." See, also, *Shartla v. Modern Brotherhood, etc.* (1909), 139 Mo. App. 433, 122 S. W. 1139; *Lakka v. Modern Brotherhood, etc.* (1913), 163 Iowa 159, 143 N. W. 513, 49 L. R. A. (N. S.) 902, and cases *pro* and *con* cited and collected in note; *Whitcomb v. Phoenix Mut. Life Ins. Co.* (1879), 29 Fed. Cas. No. 17,530. We hold that the facts show a waiver of the formalities, the omission of which is urged. Some other questions respecting the validity of the certificate are argued, but, as indicated, they are not presented by the issues. The evidence sustains the validity of the beneficiary certificate.

On the subject of fraud, in inducing and procuring the settlement, the evidence is by no means conclusive. There was evidence tending to show that such settlement was

9. induced by the statements and representations of certain of appellant's officers and agents, and especially by one of its field examiners charged with the duty of investigating the claim. The jury in answer to an interrogatory found that such statements were not true, correct or in accordance with the facts. The general verdict includes a finding in appellee's favor on the issue of fraud. We should not feel warranted in setting out the substance of the evidence bearing on this question. It is sufficient to say that the evidence in this respect was sufficient to make a case properly submitted to the jury, and under such circumstances,

it is not within the prerogative of this court to interfere with the verdict.

The court's action in giving and also in refusing a large number of instructions is challenged as error. While it perhaps would be more satisfactory to the parties

10. should we take up these instructions and discuss them in detail, yet to do so would lengthen this opinion beyond justification. In the main and in so far as concerns the substantial questions arising under the instructions, the field is covered in our discussion of the sufficiency of the evidence. As a rule, the court in charging the jury, and in disposing of tendered instructions, followed the law as we have outlined it herein. There are certain inaccuracies in the instructions which, however, are rendered harmless, either by the answers of the jury to interrogatories, or by the state of the evidence. In certain general instructions the court perhaps overstepped the issues, but if so, appellant may not complain as the same infirmity exists in instructions tendered by it. However, we call special attention to instruction No. 15, given by the court on its own motion, which is as follows: "If you should find for the plaintiff, then I instruct you that the plaintiff's husband, having died in the second year after the issuing of the policy, the defendant was only liable for the sum of \$1,500, and from this should be deducted the \$300 already paid to plaintiff, and to which residue, to wit, \$1,200, you may add interest at the rate of 6 per cent from the date of payment of said sum of \$300 until this date, and said sum, to wit, \$1,200 and interest would be the amount of recovery."

The amount of the verdict indicates that the jury followed this instruction. The instruction does not state the proper measure of recovery, and it was error to give it. The action is not based on the contract of insurance. Its theory is to recover damages for the alleged fraud in procuring the settlement. In such form of action the measure of damages is the difference between the amount received in the settlement

and the actual value of the thing surrendered. The value of the thing surrendered is not necessarily equivalent to the face value of the contract of insurance. While doubtless the face value of the thing surrendered should enter into consideration in determining its actual value, yet there are other elements that can not be ignored. Among such other elements are the questions of whether, aside from the fraud, there was in fact a dispute respecting the validity of the thing surrendered; whether the compromise was entirely induced by the fraud, or whether the fraud was merely effective in reducing the amount paid. In assessing the damages much must be left to the sound discretion of the jury, from a consideration of all the evidence bearing on that question, and under proper instructions by the court. For full discussion, see *Supreme Council, etc. v. Apman* (1907), 39 Ind. App. 670, 80 N. E. 640. The decision in the case cited is based in part on *Gould v. Cayuga County Nat. Bank* (1885), 99 N. Y. 333, 2 N. E. 16. However, although

11. appellant in its motion for a new trial assigns excessive damages as one of the causes therefor, in its brief it directs no point to such cause, and in no other manner complains of the amount of recovery. Such cause for a new trial is, therefore, waived, and it must be considered that assuming a right to recover at all, appellant is not dissatisfied with the amount of the verdict. Under such circumstances, both the Supreme Court and this court seem to be committed to the rule that error in an instruction on the measure of damages is not available. *Pittsburgh, etc., R. Co. v. Macy* (1915), ante 125, 107 N. E. 486, and cases cited. In the case cited, error in the assessment of the amount of recovery, if any, was waived by a failure to assign it in the motion for a new trial. Here it is waived by a failure to discuss it in the brief.

Appellant assigns as error the overruling of its motion to set aside the court's ruling on the motion for a new trial, and to permit appellant to be heard in argument thereon.

The court did not err in this respect. Under the
12. practice, the right to be heard in argument on a motion for a new trial does not exist. The question of the necessity or advisability of such argument in any
13. case must be left to the trial court. It may be said in addition that the record shows the parties present by counsel at the ruling on the motion for a new trial, and that appellant reserved an exception to such ruling. Neither in the entry of the ruling on the motion for a new trial, nor otherwise in the record does it appear that appellant made any objection to the court's disposing of such motion without argument heard, and it must, therefore, be presumed that appellant consented thereto. Having consented, appellant can not now be heard to object.

Questions are discussed respecting the court's rulings in admitting and excluding certain items of evidence and offered evidence. There was no error in such rulings.

We find no error in the record calling for a reversal. Judgment affirmed.

NOTE.—Reported in 107 N. E. 749. As to the law of mutual benefit associations, see 19 Am. St. 784. See, also, under (2) 29 Cyc. 68; (3) 29 Cyc. 86; (4) 29 Cyc. 89; (5) 29 Cyc. 193, 188, 244; (6) 29 Cyc. 186; (7) 29 Cyc. 188; (8) 29 Cyc. 190, 193, 194, 244; (9) 3 Cyc. 348; (11) 3 C. J. 1412; 2 Cyc. 1014; 3 Cyc. 388; (12) 29 Cyc. 1006; (13) 3 C. J. 873; 2 Cyc. 707.

VANDALIA COAL COMPANY v. BLAND, ADMINISTRATOR.

[No. 8,424. Filed January 20, 1915. Rehearing denied May 14, 1915. Transfer denied June 22, 1915.]

1. *APPEAL.—Review.—Briefs.—Waiver of Error.*—Where neither the motion for a new trial nor its substance is set out in appellant's brief, and the brief neither shows that any exceptions were reserved to the ruling thereon, nor contains points directed to the assignment of error in the ruling thereon, all questions arising on the overruling of such motion are waived. p. 311.
2. *MASTER AND SERVANT.—Injuries to Servant.—Assumption of Risk.—Knowledge of Danger.—Complaint.—General and Specific*

Allegations.—Where the complaint, in an action against a mining company for the death of an employe nineteen years of age, alleged generally that defendant knew of the conditions, ways, appliances, etc., complained of, and that decedent did not know of the dangers, etc., and could not in the exercise of reasonable care have known of same, and alleged specifically that decedent had been employed for several months as a car coupler on a certain "runaround entry" in defendant's mine wherein defendant carelessly maintained one of its cars with a bolt projecting therefrom so as to catch on the clothing of any one rubbing against same, and so as to rub a great groove in the wall of the entry, by reason of which "bolt and construction as aforesaid, said car on said date was dangerous", etc., and that plaintiff's decedent was injured while in the performance of a specific duty by coming in contact with said car and bolt and being caught between the car and the wall of the entry, etc., all without decedent's fault, it can not be said as a matter of law that the facts specifically pleaded show that decedent knew and appreciated the danger so as to be charged with assumption of the risk. pp. 313, 315, 317.

3. *MASTER AND SERVANT.—Injuries to Servant.—Assumption of Risk.—Knowledge.—Appreciation of Danger.*—In order to charge an employe with the assumption of the risk from which his injury resulted, especially where the injured person is an infant or otherwise lacking in experience or judgment, it must not only be shown that he knew of the defects and dangers, but that he appreciated them. p. 315.

4. *MASTER AND SERVANT.—Injuries to Servant.—Assumption of Risk.—Application of Rule.*—It is when applied to the evidence necessary to sustain an averment of want of knowledge of the defect or danger that full force and effect is given to the rule of assumed risk, rather than on a consideration of that question from the face of the complaint. p. 317.

5. *DEATH.—Action for Wrongful Death.—Emancipated Minor.—Right of Recovery.—Complaint.*—Where the complaint, in an administrator's action to recover for the wrongful death of an emancipated minor, alleged that decedent contributed to the support of his parents and brothers and sisters, that all of said brothers and sisters were dependent on him for support, etc., and that by reason of his death the decedent's parents and brothers and sisters had been damaged in the sum named, it was sufficiently shown as a matter of pleading that such persons had a right to expect that the contributions would continue for a time at least, and that they had a right to expect that decedent so intended. p. 317.

From Greene Circuit Court; *Charles E. Henderson*, Judge.

Action by Joseph Bland, administrator of the estate of Roscoe Spice, deceased, against the Vandalia Coal Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Henry W. Moore, for appellant.

Oscar E. Bland, for appellee.

SHEA, J.—This was an action brought by appellee as administrator to recover damages for the death of Roscoe Spice, alleged to have been caused by reason of appellant's negligence. From a judgment in appellee's favor for \$2,500, this appeal is prayed. The errors assigned are the overruling of appellant's demurrer to the complaint and its motion for a new trial.

Briefly stated, the complaint charges that decedent, a young man less than nineteen years old, who had been emancipated, was at the time of his injury and had been for several months employed by appellant in its coal mine as a car coupler. His place of work was upon a track called a run-around or cut-off, constructed and maintained by appellant to expedite the handling of coal cars in said mine, both loaded and empty. Said cars were moved by an electric motor. The complaint contains a detailed description of the mine and the decedent's working place, which was on the south "runaround" entry. It is charged that it was the duty of appellant to furnish a safe place for decedent to work, and to furnish suitable tools and appliances with which to work; that there was a negligent failure to discharge this duty in that it constructed and maintained the south runaround entry "in such a way that the rib or walls of said entry were too close together which caused said entry to be too narrow, and negligently made and constructed said entry in such a way that said ribs or walls were within seven inches of the track in said entry, and said ribs and walls were so constructed and made in said entry that the cars and motor rubbed against said entry walls, and was thereby ren-

dered unsafe for plaintiff's decedent to work in, and be situated as hereinafter set out". As hereinafter set out the car is also charged to have been negligently constructed and maintained. The specific allegations of the complaint, together with the general allegations of knowledge and notice to appellant of the defects and dangers, together with lack of knowledge upon the part of decedent are hereinafter set out in full. The action is brought for the next of kin for the pecuniary loss sustained by them because of the death of decedent in the manner and form as charged. These allegations are set out in full. It is also charged that immediately before his injury he was required and directed by appellant to "place a sprag in the wheels of the seventh or eighth car back from the motor." In attempting to do this decedent received the injuries which caused his death as described. Demand for \$5,000.

Neither the motion for a new trial nor the substance thereof is set out in appellant's brief. Neither is it stated in the brief that appellant reserved an exception to

1. the ruling of the court thereon, nor has appellant claimed in the points stated in its brief that the court erred in overruling its motion for a new trial. All questions attempted to be presented by the motion for a new trial are therefore waived. This may appear in some instances to be a harsh rule, but it is of long standing, and has been repeatedly announced by the Supreme Court and followed by this court, and we are therefore bound by it.

In the case of *Bennett v. Root Furniture Co.* (1911), 176 Ind. 606, 608, 96 N. E. 708, the court said: "Appellants have not set out in their brief any motion for a new trial or the substance thereof, nor any ground assigned therefor, as required by Rule 22 of this court. Appellants have therefore waived any right to question said rulings if made. *Hall v. McDonald* (1908), 171 Ind. 9, 17, 85 N. E. 707, and cases cited. Nor have appellants claimed in the points stated in their brief that the court erred in overruling their motion

for a new trial. They have thereby waived the determination of any question in regard to said instruction, and the correctness of the action of the court in sustaining the motion to strike out certain portions of said depositions.” In the case of *Dillon v. State* (1911), 48 Ind. App. 495, 96 N. E. 171, the court quotes with approval from *Magnuson v. Billings* (1899), 152 Ind. 177, 180, 52 N. E. 803, as follows: “It is said in *Magnuson v. Billings* * * * that rules, when adopted and published, ‘have the force and effect of law, and are obligatory upon the court, as well as upon parties to causes pending before it.’ In the same case it is further said: ‘A rule of court is a law of practice, extended alike to all litigants who come within its purview, and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights, as well as to secure the prompt and orderly dispatch of business.’ To attempt to ascertain and decide questions not presented, as required, would be to abrogate the rules, which are as binding upon the courts as they are upon litigants.” See, also, *Barnett v. State* (1912), 177 Ind. 461, 462, 97 N. E. 530; *Carmody v. State* (1912), 178 Ind. 158, 160, 98 N. E. 870; *Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co.* (1912), 50 Ind. App. 59, 96 N. E. 807; *Rahke v. McNulty* (1914), 55 Ind. App. 615, 104 N. E. 523.

There remains to be determined by this court the single question as to the sufficiency of the complaint as against a demurrer. The memorandum filed with the demurrer contains the following specifications set out in the points and authorities, and discussed by appellant’s counsel: “5. The general averments of knowledge on behalf of the defendant and want of knowledge on the part of the alleged employe, and negligence on the part of this defendant, are each insufficiently alleged, and are each overcome by special averments. 7. The averments of each paragraph show that the alleged injury was the result of an accident for which the defendant was in no way responsible. 8. The averments of

each paragraph show that the alleged injury was the result of dangers and hazards inherent in the employment which were well known to the injured. 9. The averments of each paragraph show that the alleged injury was the result of dangers and hazards inherent and apparent in the employment and over which this defendant had no control. 16. The averments of each paragraph of complaint show that the alleged injury was the direct result of the negligence and carelessness of the injured. 18. That the complaint shows on its face that the deceased was a minor under the age of 21 years, but that he had been emancipated by the father and mother who are both living, and set free to work for whomsoever he pleased."

In argument it is very earnestly insisted that the facts pleaded show that appellee's decedent having worked for several months at the place where he was injured had

2. or should have had knowledge of the conditions, and therefore assumed the risk, and that said facts so pleaded overcome the general allegations of want of knowledge upon the part of appellee. The facts specially pleaded as shown in the complaint are as follows: "That among the large number of employes in defendant's mine at said time was plaintiff's decedent herein, Roscoe Spice; that his employment consisted of, and his duties were on said date, and for several months prior thereto, that of a car coupler, on said south 'runaround entry', and for which services he received from the defendant the sum of \$2.70 per day. That defendant negligently and carelessly made, constructed and maintained one of its said coal cars in such a way that a large bolt projected through the top of the south side of said car and said bolt projected past the tap thereon an inch and three-quarters. The said bolt had threads upon it and was rough, and would and did catch upon the clothing of anyone rubbing against it. That said bolt projected through said car so far that for many months prior to injuries hereinafter set out it had rubbed into the wall in said entry and rubbed

a great groove in the wall of said entry when said car passed along the track in said entry. That by reason of said bolt and construction as aforesaid, said car on said date was dangerous, defective and unsafe for the purpose for which defendant, on said date, used it."

The manner in which decedent was injured is set out as follows: "That in discharge of his said duties, plaintiff's decedent undertook to cross between said cars for the purpose of placing sprags as aforesaid, and in so doing came in contact with said car and bolt, and that in coming in contact with said car and bolt as aforesaid, he was using due care and diligence, and was wholly without fault, and when he came in contact with said car, the said bolt which projected out thereon caught in the clothing of plaintiff's decedent and said heavy moving car, to which was attached a heavy electric motor, pulled and drew plaintiff's decedent up against the rib or wall of said entry, which rib or wall at said point was so close to the track that it rubbed against said car. That plaintiff's decedent was then and there so caught between the car and rib that the pressure of the car against his body threw the car off the track, and by reason of said pressure" decedent was bruised and wounded from which injuries he died.

The general allegations as to knowledge upon the part of appellant and absence of knowledge upon the part of decedent of the alleged dangerous condition of the working place are as follows: "That defendant knew, and had full knowledge of all the conditions, ways, places, construction, appliances and things herein referred to and complained of, and that plaintiff's decedent had no knowledge of any of the dangers, conditions, ways, places, construction, appliances, and things herein referred to and complained of, nor could he by the exercise of reasonable care and diligence have known of them."

We need not cite authority upon the proposition that the master is required to use reasonable care to furnish a reason-

ably safe place for the servant to do his work, with reasonably safe tools and appliances therefor. It is not seriously contended that the working place was reasonably safe, nor that the master was without notice of its condition as charged, but it is insisted that the complaint shows that the servant in this case had as good or better opportunity than the master to know the conditions, and if he did not know, he was chargeable with such knowledge, and therefore assumed the risk of injury. If knowledge alone upon the part of the servant was the sole element which enters into

3. such a condition as presented by this complaint, there would be much force in appellant's position, but it has been repeatedly held by our courts that the servant must not only know, but he must appreciate the defects and danger. While the charge is that the dangerous condition existed for several months, and the servant had been employed there continuously for some time, it is also charged that immediately before the injury he was directed to do the particular thing which resulted in his injury. This order or direction is not important in this case, as it is a common-law action, except as showing the state of mind of decedent as he attempted to perform the task as directed. Human experience shows and common sense applied to the facts convinces us, that a boy less than nineteen years old will not ordinarily act with as much care and discretion as a man of more mature years. Appellant accepted the services of decedent with this knowledge. This is important in this case only as bearing upon the question of whether this young man under all the circumstances of this case as disclosed by the complaint, which alleges that he was inexperienced, not only knew, but appreciated the defects and consequent danger. Can this court declare as a matter of law upon the facts pleaded, that this decedent knew and appreciated the defects and danger, in the face of the general allegation that he did not know? In the case of *Chicago, etc., R. Co. v. Martin* (1903), 31 Ind. App. 308, 65

N. E. 591, the court said: "Mere knowledge of the existence of the risk does not in all cases raise the presumption that the servant has agreed to assume it." In the case of *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541, 550, 70 N. E. 888, the court said: "The doctrine of assumed risk depends upon an implied contract created, in the case of obvious danger, from the voluntary act of the employe in continuing in the service. *Worman v. Minich* (1901), 28 Ind. App. 31 [62 N. E. 85]; *Davis Coal Co. v. Polland* (1902), 158 Ind. 607 [62 N. E. 492], 92 Am. St. 319. There can be no room for implying such contract except where the employe acts in view of the danger to which he is subjected. Where he is an infant, or otherwise lacking in discretion or judgment, there can never be any doubt but that he must be shown to have appreciated the danger before he can be charged with assumption of the risk arising therefrom; and this, too, although the facts brought to his knowledge are sufficient to have warned one of ordinary capacity. *Mullin v. California Horseshoe Co.* (1894), 105 Cal. 77, 38 Pac. 535." In the case of *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 302, 53 N. E. 235, the court said: "The mere fact that a servant may know or could have known of a defect by the exercise of ordinary care does not necessarily charge him with an assumption of the risks growing out of such defect, because the risks and hazards on account thereof may not be so open and apparent as to be appreciated by him, on account of his ignorance or want of experience. *Wuotilla v. Duluth Lumber Co.* [1887], 37 Minn. 153, 33 N. W. 551, 5 Am. St. 832; *McDonald v. Chicago, etc., R. Co.* [1889], 41 Minn. 439, 43 N. W. 380, 16 Am. St. 711; 1 Bailey, *Personal Injuries* §§852, 857." In the case of *City of Fort Wayne v. Christie* (1901), 156 Ind. 172, 176, 59 N. E. 385, the court said: "It may be observed that an agreement on the part of the servant to assume the risk can not, in all cases, be presumed from mere knowledge of its existence. *Consolidated Stone Co. v. Summit* [1899], 152 Ind. 297 [53

N. E. 235]. It is only where the person injured, knowing and appreciating the danger, voluntarily encounters it, that such knowledge is a defense. It is said, however, that knowledge is a material fact for the consideration of the jury in determining whether, under all the circumstances, the plaintiff was guilty of contributory negligence."

A different question might arise if we were giving consideration to the evidence in this case. In *Robinson & Co. v. Etter* (1903), 30 Ind. App. 253, 258, 63 N. E. 767, the

4. court said: "It is when applied to the evidence necessary to sustain the averment of want of knowledge of the defect or danger that full force and effect is given to the rule of assumed risk. * * * *Wabash R. Co. v. Ray* [1899], 152 Ind. 392, [51 N. E. 920]; *Consolidated Stone Co. v. Summit, supra.*" *Pittsburgh, etc., R. Co. v. Parish* (1902), 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. 120; *City of Fort Wayne v. Christie, supra.*

While the complaint is not scientifically drawn, we do not think the facts pleaded are sufficient to overcome the general allegation of lack of knowledge as claimed by appellant. In other words, we can not say as matter of law that this decedent under the facts disclosed in this complaint knew and appreciated the danger. *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99.

Point 18 in the memorandum filed with the demurrer attempts to raise the question as to whether the beneficiaries alleged are entitled to recover anything on account of

5. the death of plaintiff's decedent. The question is presented in the points and authorities, and is also argued at length in the brief. It is insisted that since decedent had been emancipated, he was under no legal obligation to contribute to the support of his mother, father, brothers and sisters as shown in the complaint. There can be no recovery in this case except for pecuniary loss, and if the complaint does not show that the parties claiming have sus-

tained such loss, there can be no recovery. The pecuniary loss in this case is the amount which appellee might reasonably expect would have been contributed to those for whom the action is brought by decedent had he lived. *Diebold v. Sharp* (1898), 19 Ind. App. 474, 49 N. E. 837; *Mayhew v. Burns* (1885), 103 Ind. 328, 2 N. E. 793. It is insisted that there must not only be reasonable expectation on the part of the beneficiaries that the contributions to support rendered prior to the death would continue for some period of time thereafter, but that it must be so alleged. The complaint alleges that "while plaintiff's decedent had been emancipated and set free he contributed to the support of his father and mother, brothers and sisters hereinafter named. That at the time of the injury and at the time of his death, he, plaintiff's decedent, had a father, Charles Spice, a mother, Sarah Spice, a sister, Minnie Spice, sixteen years of age, a sister, Helen Spice, eight years of age, a brother, Jack Spice, ten years of age, a brother, Vernie Spice, fourteen years of age, and a brother, Onton Spice, eight months of age. That all of said brothers and sisters were dependent upon plaintiff's decedent for support and maintenance, and that at the time of his death, and for a long time prior thereto, plaintiff's decedent had and did contribute to the support and maintenance of all of his above named relatives. That by reason of the death of said plaintiff's decedent as aforesaid his brothers, sisters, father and mother have been damaged in the sum of \$5,000.00."

While these allegations are not perfect, the court is of the opinion that they are sufficient to enable the court to infer that the beneficiaries had a right to expect that the contributions which had been made for sometime before decedent's injury would continue for a time at least, and that the beneficiaries had a right to expect that the decedent so intended. *Tiffany, Death by Wrongful Act* (2d ed.) §§158, 159; *Standard Forgings Co. v. Holmstrom* (1915), 58 Ind. App. 303, 101 N. E. 872; *Duzan v. Meyers* (1903), 30 Ind. App. 227, 65 N.

McConnell v. American Nat. Bank—59 Ind. App. 319.

E. 1046, 96 Am. St. 341; *Diebold v. Sharp, supra*; *Mayhew v. Burns, supra*; *Louisville, etc., R. Co. v. Wright* (1893), 134 Ind. 509, 34 N. E. 314; 13 Cyc. 363.

We have examined all of the authorities cited by appellant from other jurisdictions and find that while some conflict appears, in the main they support the general principles here stated.

The complaint is sufficient to withstand a demurrer. *Domestic Block Coal Co. v. DeArmey, supra*; *Republic Iron, etc., Co. v. Lulu* (1911), 48 Ind. App. 271, 92 N. E. 993. Judgment affirmed.

NOTE.—Reported in 108 N. E. 176. As to risks assumed by servant, see 52 Am. Rep. 737. As to the measure of damages for death by wrongful act of collateral next of kin, see 10 Ann. Cas. 113. See, also, under (1) 3 C. J. 1413; 2 Cyc. 1015; (2) 26 Cyc. 1913 Anno. 1397-80; (3) 26 Cyc. 1190, 1219; (4) 26 Cyc. 1454; (5) 13 Cyc. 341.

McCONNELL, ADMINISTRATOR, v. AMERICAN NATIONAL BANK.

[No. 8,639. Filed January 9, 1914. Rehearing denied May 26, 1914. Transfer denied June 22, 1915.]

1. MORTGAGES.—*Equitable Assignment*.—*Sale of Mortgage Note*.—The sale of a note secured by mortgage operates as an equitable assignment of the mortgage and thereafter the seller of the note holds the mortgage as trustee for such purchaser. p. 323.
2. BILLS AND NOTES.—*Payment*.—*Acceptance of Forged Note*.—The debt evidenced by a note secured by mortgage is not discharged by the acceptance in its stead, with the belief that it is genuine, of a new note for a greater amount, and bearing the name of a solvent and sufficient surety, when in fact such new note is a forgery. p. 323.
3. MORTGAGES.—*Record*.—*Unauthorized Cancellation*.—*Rights of Original and Subsequent Mortgagees*.—As between a mortgagee, whose mortgage has been discharged of record without his fault and by an unauthorized third person, and one who has been induced by such cancellation to believe that the mortgage was cancelled in good faith, and has dealt with the property by purchas-

ing the title or accepting a mortgage thereon as security for a loan, the equities are balanced and the rights under the prior mortgage remain, notwithstanding such apparent discharge. p. 323.

4. **MORTGAGES.—Record.—Cancellation.—Rights of Original and Subsequent Mortgagees.**—Where a mortgagee is in any way responsible for the mortgage being released of record, or if such release is procured through the fraud, incaution, credulity or misplaced confidence of the mortgagee, he is estopped in equity from asserting the priority of his mortgage as against one who has innocently dealt with the property in the belief that the mortgage was satisfied. p. 324.
5. **MORTGAGES.—Cancellation of Record.—Reinstatement.—Priority as to Creditors Subsequent to Cancellation.**—Where, following the cancellation of a mortgage induced by the belief that a note given by the mortgagor in lieu of the mortgage note was valid, it developed that such new note was a forgery, and the bank entitled to such mortgage security brought an action to procure the reinstatement of the record of such mortgage, the court properly held that such mortgage when reinstated should be inferior to the lien of a mortgage taken in good faith by another bank subsequent to such cancellation in the belief that the property was then unincumbered; and the holding, as against persons who became general creditors of the mortgagor subsequent to such cancellation, that the lien of such mortgage was entitled to priority, was also correct in view of the fact that such general creditors had no knowledge at or before the time the loans were made by them that such mortgage had been cancelled of record, and were not thereby induced to make the loans, and the acts of the plaintiff were not such as to constitute an estoppel *in pais*. p. 324.
6. **ESTOPPEL.—Estoppel as a Defense.—Pleading.—Action Against Administrator.**—While estoppel is an affirmative defense, and, as a general rule, must be specially pleaded, in an action against an administrator evidence of estoppel is admissible under the general denial. p. 325.
7. **MORTGAGES.—Reinstatement of Record.—Estoppel.—Complaint.**—The facts disclosed by a complaint to procure the reinstatement of the record of a mortgage, the cancellation of which had been induced by the delivery to plaintiff of a forged note which plaintiff accepted in the belief that it was valid, and after due investigation as to the value of the surety thereon, did not show facts to constitute an estoppel as against persons who became general creditors of the mortgagor subsequent to such cancellation, and hence was not insufficient on the ground that it disclosed an affirmative defense in favor of such creditors. p. 326.

From Gibson Circuit Court; *Herdie F. Clements*, Judge.

Action by the American National Bank against Abner G. McConnell, administrator of the estate of Leslie C. Hunter, deceased. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

John & Johnson and Embree & Embree, for appellant.

Harvey Harmon, for appellee.

LAIRY, C. J.—Appellee brought this suit to reinstate a certain mortgage on real estate owned by Leslie C. Hunter in his lifetime. The case was tried by the court and appellee prevailed. The court made a special finding of facts from which it appears that on December 27, 1909, Leslie C. Hunter purchased a part of lot 44 in Owensville from John C. Kendle for the price of \$3,000 and that as a part of the purchase price he executed a note to Kendle for \$2,000 and secured the same by a mortgage, on the lot purchased, signed by himself and his wife, Lasia L. Hunter; that on January 3, 1910, Kendle sold this note to appellee bank for the sum of \$2,000 cash; that the mortgage was recorded by Kendle but that it was not assigned to the bank. The note was endorsed by Kendle in blank.

Shortly before the note became due Kendle called upon the bank and requested that when the note was paid he should be informed of the fact. After the note became due and after Leslie C. Hunter had been three times notified by the bank, he wrote a letter to the bank requesting it to send him a note for the amount of \$2,500 due in one year and promising to get one Harry O. Pollard to sign it as security. In response to this letter the bank sent this note to Leslie C. Hunter, who returned it to the bank on January 25, 1911, signed by himself and purporting to be signed by Harry O. Pollard. The bank investigated the financial standing of Harry O. Pollard and found that he was solvent and that his signature to the note would make it good. On January 26, 1911, the bank, believing that the name of Harry O. Pollard

signed to the note was his genuine signature, accepted the note in payment of the note of \$2,000 secured by mortgage and endorsed to the bank by Kendle, and notified Kendle by letter that the note had been paid, whereupon Kendle on January 2, 1911, released the mortgage of record. The remainder of the proceeds of the \$2,500 note, after deducting the amount of the \$2,000 note and accrued interest, was credited by the bank to the checking account of Leslie C. Hunter. The name of Harry O. Pollard as signed to the \$2,500 note was not his genuine signature but was a forgery. On January 17, 1912, Leslie C. Hunter committed suicide and on January 25, 1912, appellant Abner D. McConnell was appointed administrator for his estate which is insolvent.

The court further finds that on March 23, 1911, after the mortgage securing the \$2,000 note had been released by Kendle, Leslie C. Hunter borrowed \$2,000 from the Citizen's Trust and Savings Bank of Princeton and, to secure the same executed a mortgage in which his wife joined, on the real estate which he had formerly mortgaged to secure the note sold by Kendle to appellee bank. On April 10, 1911, Leslie C. Hunter borrowed \$400 from Elza Mounts and on September 18, 1911, he borrowed \$2,650 from the First National Bank of Poseyville, and, on October 10, 1911, he borrowed \$275 from the Owensville Building and Loan Association. For each of the sums so borrowed he executed his note and each of the notes so executed bears the name of Harry O. Pollard as security and the \$2,650 note also bore the name of Harvey Knowles as surety, but the names of the sureties to all of these notes are forgeries. These notes have all been filed and are pending as claims against the estate of Leslie C. Hunter.

We have not set out the facts as fully as they are shown in the finding of the court but have stated only so much as is necessary to a proper understanding of the case.

Upon the facts found the court stated as its conclusions of law that the American National Bank of Princeton was the

owner and as such was entitled to the same rights in the note and mortgage sought to be reinstated as was possessed by Kendle prior to the assignment; that the note and mortgage should each be reinstated and should be in full force and effect; that the mortgage so reinstated should be a lien on the real estate described therein, inferior to the lien of the mortgage in favor of the Citizen's Trust and Savings Bank and superior to any claims of Elza Mounts, The First National Bank of Poseyville and the Owensville Building and Loan Association.

The sale of the note by Kendle to the bank amounted to an equitable assignment of the mortgage given to secure it,

and thereafter Kendle held the mortgage as a trustee

1. for appellee bank. *Burton v. Baxter* (1844), 7 Blackf. 297; *Reeves v. Hayes* (1884), 95 Ind. 521; *Thomson v. Madison Bldg., etc., Assn.* (1885), 103 Ind. 279, 2 N. E. 735.

The debt evidenced by the original note was not paid

2. by the forged note delivered by Hunter and accepted by the bank. The bank accepted this note with the belief that it was genuine and its officers were thereby misled and induced to notify Kendle that the original note of \$2,000 had been paid and relying on such statement he cancelled the mortgage. After the cancellation of this mortgage, the Citizen's Trust and Savings Bank loaned \$2,000 to Hunter and took a mortgage on this same real estate as security for the loan having no notice of the fraud that had been practiced in procuring the release of the former mortgage and believing that such mortgage had been in fact satisfied.

As between a mortgagee whose mortgage has been discharged of record solely through the act of a third party which act was unauthorized by the mortgagee and for

3. which he was in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been cancelled in good faith, and has dealt with the property by purchasing the title or accepting a mortgage thereon

as security for a loan, the equities are balanced. In such case the rights will be settled in the order of time and the prior mortgage must remain despite the apparent discharge. *Harris v. Cook* (1877), 28 N. J. Eq. 345; *De St. Romes v. Blanc* (1868), 20 La. Ann. 424, 96 Am. Dec. 415; 27

Cyc. 1225. If, however, the mortgagee is in any way

4. responsible for the mortgage being released of record or, if the release of record is procured through the neglect, incaution, credulity or misplaced confidence of the mortgagee, a different rule will govern in determining the equities between the mortgagee and one who has innocently dealt with the property in the belief that the mortgage was satisfied. In such a case the mortgagee is estopped in equity from asserting the priority of his mortgage. When one of two innocent parties must suffer loss, it must fall upon that one who by incaution or misplaced confidence occasioned it, or who placed it in the power of a third party to perpetrate the fraud which occasioned the loss. *City Council, etc. v. Ryan* (1884), 22 S. C. 339, 53 Am. Rep. 713; *Heyder v. Excelsior Bldg., etc., Co.* (1886), 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49; *Wittenbrock v. Parker* (1894), 102 Cal. 93, 36 Pac. 374, 41 Am. St. 172, 24 L. R. A. 197; 27 Cyc. 1226.

The court undoubtedly made a correct application of these rules in holding that the lien of the mortgage of appellee when reinstated should be inferior to the lien of the

5. mortgage of the Citizen's Trust and Savings Bank, and both parties to this appeal in effect concede that this conclusion is right, but appellant takes the position that the same rules should be applied in determining the priority of the lien of this mortgage when reinstated as between the mortgagee and the general creditors of the estate of Leslie C. Hunter. It does not appear that any of the parties who made loans to Leslie C. Hunter after the mortgage securing the note held by the American National Bank was cancelled, had any knowledge at or before the time such loans were made, that this mortgage had been released of record, or that

they or any of them were induced to extend credit on the faith of the real estate being unincumbered. In fact the special finding shows that before any of these loans were made the real estate in question had been remortgaged for \$2,000 to the Citizen's Trust and Savings Bank of Princeton. The debt secured by the original mortgage was not paid and discharged by the forged note given to the American National Bank as payment, and the release of the mortgage given to secure that debt was obtained by fraud. As between the mortgagor and the holder of the note secured by the mortgage, the latter was clearly entitled to have the cancellation of the mortgage set aside and its lien reestablished. This right also exists as against the creditors of the mortgagee unless facts appear that are sufficient to constitute an estoppel *in pais*. The fact that the mortgage given to secure the note held by the American National Bank was cancelled when in fact the debt was not paid, and the further fact that the responsibility for such cancellation can be traced to incautious or negligent conduct on the part of the bank are not, of themselves, sufficient to create an estoppel as against the bank and in favor of the subsequent general creditors of the mortgagor. To create such estoppel, it must further appear that such subsequent creditor knew that the mortgage had been cancelled, and believed that it had been satisfied, and that he relied on such belief, and was induced thereby to extend credit to the mortgagor.

It is evident, we think, from what has been said, that the trial court properly reached the conclusion that the facts found did not show an estoppel as against the mortgagee and that the mortgage should be reinstated and held to be superior lien to that of the general creditors named in the special finding.

Estoppel is an affirmative defense, and as a general rule must be specially pleaded. This case being a suit

6. against an administrator, evidence of estoppel could be admitted under the general denial by virtue of our

Intermediate Life, etc., Co. v. Cunningham—59 Ind. App. 326.

statute. The complaint on its face did not disclose facts sufficient to show estoppel as against the general creditors

7. named in the special finding, and for that reason it can not be held insufficient upon the ground that it disclosed an affirmative defense in favor of such creditors.

The court did not err in overruling the demurrer to the complaint and the conclusions of law were correct. Judgment affirmed.

NOTE.—Reported in 103 N. E. 809. As to revival of mortgage when satisfied by mistake, see 5 Am. St. 703. As to the right to show estoppel under general denial in reply, see 20 Ann. Cas. 300. As to the right to reinstatement of mortgage released or discharged by mistake, see 58 L. R. A. 788; 26 L. R. A. (N. S.) 816; 28 L. R. A. (N. S.) 825, 904. See, also, under (1) 27 Cyc. 1287; (2) 7 Cyc. 1013; (4, 7) 27 Cyc. 1225; (5) 27 Cyc. 1433; (6) 16 Cyc. 806.

THE INTERMEDIATE LIFE ASSURANCE COMPANY v. CUNNINGHAM.

[No. 9,029. Filed March 2, 1915. Rehearing denied May 14, 1915. Transfer denied June 22, 1915.]

1. NEW TRIAL.—*Motion.—Filing.—Review.*—Where, pending an adjourned term of court, at which a verdict was rendered for plaintiff, the defendant filed a motion for new trial with the clerk who made a vacation entry of such filing, and there was nothing to show that the motion was presented to the trial court within thirty days from the time the cause was tried and judgment rendered, the court did not err in sustaining a motion to strike same from the files and to expunge such vacation entry of its filing. pp. 328, 329.
2. NEW TRIAL.—*Motion.—Filing.—Statutes.*—Under §587 Burns 1914, Acts 1913 p. 848, relating to the time for filing a motion for new trial, the mere filing of the motion in the clerk's office is not sufficient, but the motion must be called to the court's attention, and, if the court has adjourned, the motion should be called to the court's attention within a reasonable time, depending upon the circumstances of each case. p. 329.

From Porter Circuit Court; A. D. Bartholomew, Judge.

Intermediate Life, etc., Co. v. Cunningham—59 Ind. App. 326.

Action by Olive Cunningham against The Intermediate Life Assurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George K. Denton, Bomberger & Curtis and Starr & Peters, for appellant.

Wm. J. Whinery and John D. Kennedy, for appellee.

SHEA, J.—A motion to dismiss this appeal has been duly presented. The cause was tried at an adjourned term of the April, 1913, term of the Porter Circuit Court, which began on July 8, 1913. The trial of this cause began on July 14, 1913, and was concluded on July 15, at which time the jury returned a verdict for appellee, upon which verdict the court, on July 15, entered final judgment in favor of appellee. The April term as shown by the record adjourned August 14, 1913, thereafter. On August 11, 1913, less than thirty days after verdict had been returned and judgment entered, and while said adjourned term was still in session, appellant filed in the clerk's office of the Porter Circuit Court a motion for a new trial of said cause.

The clerk of said court entered a vacation order showing that appellant on August 11, 1913, had filed in the clerk's office of said court its motion for a new trial, and on March 6, 1914, being the ninth judicial day of the February, 1914, term of said court, appellee filed its written motion in said Porter Circuit Court in this cause, reading as follows: "Comes now the plaintiff in the above entitled cause and respectfully moves the court to strike from the files a paper purporting to be a motion for a new trial on behalf of the defendant in this case, which paper purports to have been filed in the clerk's office of this court on the 11th day of August, 1913, and also for a further order expunging from the vacation order book of this court the vacation order book entry showing the filing of said pretended motion for a new trial in the clerk's office, on said 11th day of August, 1913, and in support of said motion would respectfully show the

Intermediate Life, etc., Co. v. Cunningham—59 Ind. App. 326.

court that this cause was tried in this court before the judge thereof and a jury on the 15th day of July, 1913, at an adjourned term of this court, which said term begun on the 7th day of July, 1913; that the jury in said cause returned a verdict for the plaintiff in said cause, and judgment was entered in this cause on the verdict of the jury returned as aforesaid on the 15th day of July, 1913. That said verdict was rendered and said judgment entered in said cause at the regular term of this court. That said term of this court continued for a period of more than thirty days after said verdict and judgment were rendered in said cause before it adjourned. That said term of this court did not adjourn until the 14th day of August, 1913. That said pretended motion for a new trial was filed by said defendant in the clerk's office of this court on the 11th day of August, 1913, less than thirty days after said verdict and judgment were given and rendered in this cause, but while the term of this court at which said verdict and judgment were rendered was still in session, and before the term of said court at which said verdict and judgment were rendered had adjourned. Wherefore, plaintiff prays that said pretended motion for a new trial be stricken from the files, and that said entry of the filing of said pretended motion for a new trial in the vacation order book of this court be expunged from the record, and for all other proper and further orders in the premises." Afterward, on April 27, 1914, said motion was by the court sustained. The ruling of the court on said motion is the only error assigned.

It has been repeatedly held that a motion for a new trial must be filed and presented to the court, and filing the same with the clerk will not be sufficient. *Emison v. Shep-*

1. *ard* (1889), 121 Ind. 184, 22 N. E. 883; *Levey v. Bigelow* (1893), 6 Ind. App. 677, 34 N. E. 128; *Wm. Decring & Co. v. Armstrong* (1898), 18 Ind. App. 687, 48 N. E. 1045; *Owen v. Harriott* (1911), 47 Ind. App. 352, 94 N. E. 591. Acts 1913 p. 848, §587 Burns 1914, reads as fol-

lows: "The application for a new trial may be made at any time within thirty (30) days from the time when the verdict or decision is rendered: *Provided*, That if the term of court at which the verdict or decision is rendered is adjourned before the expiration of thirty (30) days from the time when the verdict or decision is rendered, then the motion for a new trial may be filed in the clerk's office of said court within thirty (30) days from the time of the rendition of such verdict or decision, and not afterwards."

If the term of court at which the verdict was rendered is still in session, the motion for a new trial must be called to the court's attention within the thirty days, else "the

2. application for a new trial" will not be complete under the terms of this statute. The mere filing in the clerk's office is not sufficient. If the court has adjourned, the motion may be filed in the clerk's office, but should be called to the court's attention within a reasonable time, depending upon the circumstances of each case.

There has been a failure to comply with this rule because the record discloses the fact, as heretofore shown, that the court was in session at the time said motion was filed

1. in the clerk's office, and the record nowhere discloses that said motion for a new trial was presented to the trial court within thirty days from the time said cause was tried and judgment rendered. The record presents no error.

The judgment is therefore affirmed.

NOTE.—Reported in 108 N. E. 17. See, also, under (1, 2) 29 Cyc. 958.

ADAMS EXPRESS COMPANY ET AL. v. WELBORN.

[No. 8,473. Filed January 22, 1915. Costs Ordered Retaxed June 23, 1915.]

1. CARRIERS.—*Carriage of Live Stock.—Action for Injuries.—Complaint.*—A complaint alleging the delivery to defendant express company of a hog, the payment of the charges for transportation to a named destination, the undertaking by defendant to carry the hog safely and deliver the same to plaintiff, the delivery of the hog by defendant to its codefendant, another express company, and negligence in the carriage and treatment of the hog by defendants which caused its death while in their possession, was sufficiently clear and specific and stated a good cause of action upon the theory of the breach of the common-law duty of a carrier. p. 332.
2. APPEAL.—*Review.—Overruling Motion to Make Specific.*—The overruling of a motion to make a complaint more specific is so far within the discretion of the trial court that a cause will not be reversed on that ground in the absence of a showing that the rights of the complaining party have suffered. p. 332.
3. CARRIERS.—*Carriage of Live Stock.—Limitation of Liability.*—Where the court found that plaintiff's agent on delivering a hog for transportation from a point in Illinois to a point within this State, entered into a contract of limited liability in which it was stated that defendant's charges are fixed by and based upon the value of the animal as declared by the shipper, etc., and which on its face showed that the shipper was free to place any value that he might choose upon the animal, and there was no finding that any limitation was placed upon the value which he might declare, the court erred in its conclusion that the limitation of the liability was void; hence the plaintiff was not entitled to recover for the loss of the hog a sum greater than the valuation fixed in such contract, notwithstanding the fact that at the time the contract was entered into the defendant's agent demanded that plaintiff's agent ship the hog upon the conditions set out in the contract and neither had authority to give, nor gave, plaintiff's agent an opportunity to ship without a limitation of liability. pp. 333, 335.
4. CARRIERS.—*Interstate Commerce.—Limitation of Liability.*—The Carmack amendment to the Hepburn Act (§20 Act of June 29, 1906, 34 Stat. at Large 584, Chap. 3,591; U. S. Comp. Stat. Supp. 1911 p. 1,288), though superseding all state laws on the subject of the liability of common carriers for loss or damage to interstate shipments, does not specifically refer to agreements limiting the liability of a carrier to an agreed valuation, so that the validity of

Adams Express Co. v. Welborn—59 Ind. App. 330.

such agreements is to be determined by the common law as declared by the Federal courts. p. 334.

5. CARRIERS.—*Interstate Commerce.—Limitation of Liability.—Common-Law Rule.*—Under the common-law rule as declared by the Federal Courts, a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk; and the valuation so declared or agreed upon is conclusive in an action to recover a greater sum for loss or damage to the shipment. p. 334.
6. APPEAL.—*Costs.—Preparation of Record.*—Section 707 Burns 1914, §665 R. S. 1881, authorizes the collection of the fees of the clerk of the trial court for the transcript, and of the stenographer for the transcript of the evidence, as a part of the costs of the court on appeal, recoverable by the successful party. p. 336.
7. APPEAL.—*Costs.—Time and Manner of Taxation.*—There is no statutory provision either as to the time or manner of taxing of the costs of preparing the record, and at all events such costs may be taxed while the cause is still pending and within the time allowed for filing a petition for rehearing. p. 336.
8. APPEAL.—*Disposition of Cause.—Costs.*—Where on appeal the judgment is neither affirmed in whole, nor reversed in whole, the court under §706 Burns 1914, §664 R. S. 1881, may award the costs as it deems right. p. 337.
9. APPEAL.—*Disposition of Cause.—Costs.*—Where the judgment was affirmed on condition that appellee enter a remittitur, and otherwise to stand reversed because of error in the conclusion of law stated on the facts found, the cost of the transcript of the evidence was assessable to appellant, since the evidence was unnecessary to present the error. p. 337.

From Gibson Circuit Court; *Herdie F. Clements*, Judge.

Action by Ernest P. Welborn against the Adams Express Company and another. From a judgment for plaintiff, the defendant appeals. *Affirmed conditionally.*

Embree & Embree and *James B. Gamble*, for appellants.
Veneman & Welborn and *O. M. Welborn*, for appellee.

IBACH, J.—This was an action by appellee against appellants to recover damages for an alleged breach of their common-law duty to carry and deliver safely a certain hog shipped by appellee. The amended first paragraph and the

second paragraph of complaint are to all intents and purposes the same, and for the purposes of this appeal may be considered together. Each alleged the delivery of the hog by appellee's agent to the Adams Express Company at Trivoli, Illinois, the payment of the charges for transportation from that station to Cynthiana, Indiana, the undertaking of the Adams Express Company to carry the hog safely and deliver the same to the plaintiff, the delivery of the hog by the Adams Express Company to the United States Express Company, and negligence in the carriage and treatment of said hog by defendants which caused its death while in their possession.

Each appellant demurred to each paragraph of complaint, and filed a motion to require appellee to make each paragraph of complaint more specific, and the court ruled against appellants in each of these instances. The issues for trial were made up by answers in general denial and special answers which set up that the hog was carried under a contract of limited liability, and replies to these answers. Trial by the court, a special finding of facts made, and conclusions of law stated thereon in favor of appellee against both defendants. Over their motions for a new trial, judgment for \$400 was rendered against them.

The action of the court in overruling the motion of the Adams Express Company to require the complaint to be made more specific is assigned as error. The prin-

1. cipal averments of the complaint have previously been set forth. Both paragraphs are sufficiently clear and specific to inform appellants of the charges of negligence which they were required to meet, and stated a good cause of action upon the theory of the breach of the common-law duty of a carrier. Further, the refusal of a motion to make a complaint more specific is so far within the discretion of the trial court, that a cause will not be reversed on that ground unless the rights of the complaining party have suffered, which is not the case here. *Board, etc.*

Adams Express Co. v. Welborn—59 Ind. App. 330.

v. *State ex rel.* (1913), 179 Ind. 644, 647, 102 N. E. 97. There was evidence to show negligence on the part of each defendant contributing to the death of the hog.

The only question of importance in the case arises upon the exceptions of appellants to the court's conclusions of law, and relates to the effect of a contract of limited

3. liability which is set out in the findings of fact, and which the court found was entered into by Henry White as agent of appellee and F. E. Bird as agent of appellant Adams Express Company, at Trivoli, Illinois. This contract contains an agreement that the charges of the company are fixed by and based upon the value of the animals as declared by the shipper, and that the shipper before delivering the animal to the company, demanded to be advised of the rates charged for the carriage, and was offered alternative rates proportioned to the value to be fixed and declared by the shipper, according to a published schedule. This schedule is such that the shipper may place any value whatever on the shipment. On its face the contract shows that there is no limitation whatever as to the value which the shipper may place upon the animals, and there is no finding of the court that any limitation was placed upon the value which he might declare. The rate between the points mentioned for a hog which was valued at not more than \$50 was \$13.50. The correct rate between the points for a hog valued at \$150 would be \$15, but by mistake and inadvertence Bird collected from White \$15.54. The contract contains a further stipulation that the shipper, in order to avail himself of the alternative rates proportioned to the value of the animals, declares the values mentioned to be the true values of the animals and expressly agrees that in no event shall the express company be liable in excess of the declared valuation. When this contract was entered into, the said Bird, as agent of appellant Adams Express Company, demanded of said White as agent of Welborn that he execute the instrument in writing, and ship the hog upon the conditions and

agreements set out in said instrument, he did not give said White any opportunity to ship the hog without limitation of liability, and had no authority to change said printed form of contract, or to make any other form of contract for the shipment of said hog, and had no power or authority to accept said hog under a contract other than one of limited liability. The contract under which the hog was shipped contained various other limitations of liability, none of which are brought into question in this action. The court stated a conclusion of law that the contract of limitation of liability was void.

It was decided in the case of *Adams Express Co. v. Croninger* (1912), 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and this decision has been

4. followed in all the later cases, that by the Carmack amendment to the Hepburn act (§20, Act of June 29, 1906, 34 Stat. at Large 584, Chap. 3591; U. S. Comp. Stat. Supp. 1911 p. 1288), the subject of liability of a common carrier for loss or damage to an interstate shipment becomes entirely a Federal question, since this amendment is intended to and does supersede all state laws on the same subject. As this amendment does not specifically refer to agreements limiting the liability of a carrier to an agreed valuation, but does supersede all state statutes on that subject, the validity of such agreements is to be determined by the common law as declared by the Federal courts. It is said in the opinion in the case of *Adams Express Company v. Croninger, supra*, citing among others, the leading case of *Hart v. Pennsylvania R. Co.* (1884), 112 U. S. 331, 338, 5 Sup. Ct. 151, 28 L. Ed.

717, 720: "It has therefore become an established rule

5. of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk." It was

said in the case of *Kansas City, etc., R. Co. v. Carl* (1913), 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, "when a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount. * * * The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum."

We conclude, therefore, that the shipper was bound by the stipulation in the contract that the property shipped was of the value of \$150. This was a voluntary valuation

3. given upon full and free opportunity offered him to furnish the carrier the true valuation. It was within the shipper's power to place such a valuation on the hog as expressed what he would be willing to accept as full damages, and pay a rate for carriage in proportion to the value declared, though appellant's agent was not empowered to accept property for shipment under an unlimited contract, there was no limitation whatever as to the valuation which appellee's agent could place upon the hog.

Our holding is supported by the following cases, in addition to those cited, and it will be observed from an examination of the Indiana cases cited, that the common law of this State on the subject is in all essentials identical with that declared by the Federal courts: *Atchison, etc., R. Co. v. Robinson* (1914), 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; *Wells, Fargo & Co. v. Nieman-Marcus Co.* (1913), 227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. 600; *Missouri, etc., R. Co. v. Harriman* (1913), 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *Wabash R. Co. v. Priddy* (1913), 179 Ind. 483, 101 N. E. 724; *Evansville, etc., R. Co. v. McKinney* (1905), 34 Ind. App. 402, 73 N. E. 148; *Pittsburgh, etc., R. Co. v. Mitchell* (1911), 175 Ind. 196, 91 N. E. 275, 93 N. E. 996; *Cleveland, etc., R. Co. v. Blind* (1914), 182 Ind. 398, 105 N. E. 483, 491;

Cleveland, etc., R. Co. v. Hayes (1914), 181 Ind. 87, 102 N. E. 34, 103 N. E. 839; *Adams Express Co. v. Byers* (1912), 177 Ind. 33, 95 N. E. 513; *Adams Express Co. v. Carnahan* (1902), 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. 279. The court erred in its conclusion of law that appellee was entitled to recover \$400 damages from appellants. The cause seems to have been fairly and correctly tried in all other respects, and the judgment is affirmed as to \$150, at appellee's costs, upon condition that appellee within thirty days from this date enters upon the judgment docket of the court below a remittitur of \$250, as of the date of the judgment below, and file the certificate of the clerk of such court with the clerk of this court, that such remittitur has been so made; otherwise the cause will be reversed, at costs of appellee and the cause remanded, with directions to the court to restate its conclusions of law in accordance with this opinion, and render judgment thereon.

ON MOTION TO RETAX COSTS.

IBACH, P. J.—Motion by appellee to retax costs and strike out certain costs procured by appellants against appellee.

The items of cost in controversy amount to \$55.50,

6. \$20.50 paid by appellant to the clerk of the trial court for the transcript, and \$35 paid to the stenographer for a transcript of the evidence, incorporated in the
7. bill of exceptions. It is first contended by appellee that these items of costs should be stricken out for the reason that no claim therefor was made or presented to the court or the clerk of the court until long after the decision of the court was rendered. The decision of this court was made on January 22, 1915, and the claim was first made by appellant that these costs should be taxed on March 8, 1915, at which time appellants procured the said fees to be taxed against appellee for the benefit of appellants, appellee having previously remitted a portion of the judgment. The

statute authorizes the collection of such fees as a part of the costs of this court. §707 Burns 1914, §665 R. S. 1881. Such items of cost are to be recovered by the successful party to the appeal. *Wright v. Wilson* (1884), 98 Ind. 112; *Monnett v. Hemphill* (1887), 110 Ind. 299, 11 N. E. 230. There is nothing in the statute which provides either the time or the manner of taxation of such costs, but certainly this may be done while the cause is still pending, and within the time allowed for filing a petition for rehearing.

It is further urged that the transcript of the evidence was unnecessary to the relief which was granted appellants. The

court decided that the evidence as to the liability of

8. appellants was sufficient, and decided the questions dependent on the evidence in appellee's favor, and therefore appellants should pay the costs of the tran-

9. script of the evidence. This case was neither affirmed in whole, nor reversed in whole. In such a case as this the court may award costs as it deems right. §706 Burns 1914, §664 R. S. 1881. The part reversed was for error in the court's conclusions of law on the facts found, and there was no necessity to bring up the evidence to present this error. Therefore, the costs of the transcript of the evidence amounting to \$35 are assessed to appellant, and the other costs of the appeal to appellee. *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 53, 87 N. E. 215, 90 N. E. 65, 90 N. E. 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85.

NOTE.—Reported in 108 N. E. 163; 109 N. E. 420. As to limitation of liability of carriers by notice on tickets, baggage checks, bills of lading, etc., see 5 Am. St. 719. On the question of the "Carmack amendment" as affecting state regulations as to stipulations limiting liability of common carriers for the loss or damage to goods, see 44 L. R. A. (N. S.) 257; 50 L. R. A. (N. S.) 819. On the effect of limitation of liability in receipt prepared by shipper, see 28 L. R. A. (N. S.) 645. Limitation of carrier's liability for injury to or loss of goods or baggage as affected by Interstate commerce act, see Ann. Cas. 1912 B 672. See, also, under (1) 6 Cyc. 515; (2) 31 Cyc. 644; (3, 5) 6 Cyc. 400; (4) 6 Cyc. 1915 Anno. 412—new; (6) 11 Cyc. 224, 235; (8) 11 Cyc. 212; (9) 11 Cyc. 225.

STATE OF INDIANA, EX REL. COPPAGE v. REICHARD
ET AL.

[No. 8,487. Filed June 23, 1915.]

1. **APPEAL.—Review.—Demurrer to Answer.—Sufficiency of Complaint.**—Where appellant complains of the overruling of his demurrer to a paragraph of answer, the court on appeal in reviewing such ruling will consider the sufficiency of the complaint to which the answer was addressed, even though the question of its sufficiency is not presented by the assignment of any cross error, and if the complaint is insufficient the overruling of such demurrer will be regarded as harmless. p. 341.
2. **OFFICERS.—Official Bonds.—Liability of Sureties.**—Where an officer, assuming to act as such, commits a wrong under circumstances where the law does not impose upon him any duty to act at all, the wrong is not the violation of any official duty for which the surety on his official bond can be held liable. p. 342.
3. **OFFICERS.—Action on Official Bond.—Liability.**—In an action on the bond of an officer, brought against him and the surety thereon, his liability is identical with that of the surety, and he is not liable if the surety is not liable. p. 342.
4. **JUSTICES OF THE PEACE.—Powers and Duties.—Unauthorized Acts.—Liability on Bond.**—The powers of a justice of the peace are wholly statutory, and though instruments of writing pertaining to his official duty, when attested by his official seal and signature, are presumptive evidence of his official character, his execution of a certificate not authorized by statute, though attested by his official seal, is not an official act within the meaning of his official bond; hence, where a justice executed under his official seal a certificate that a promissory note was signed by a certain person in his presence, when in fact it was not so signed, there was no breach of his official bond, since there is no statutory requirement or authority for the acknowledgment of a promissory note. (*Tucker v. State* [1904], 163 Ind. 403, and *State, ex rel. v. Walford* [1894], 11 Ind. App. 392, distinguished.) p. 343.
5. **APPEAL.—Review.—Harmless Error.**—Where appellant's complaint was insufficient to state a cause of action, intervening errors, if any, must be regarded as harmless. p. 344.

From Montgomery Circuit Court; *Jere West*, Judge.

Action by the State of Indiana, on the relation of Lewelyn J. Coppage, against John Reichard and others. From a judgment for relator, the relator appeals. *Affirmed.*

Lewellyn J. Coppage, for appellant.

M. W. Bonner, for appellees.

CALDWELL, J.—Stated generally, the facts in this case are to the effect that on March 16, 1908, Sarah J. Weaver applied to the relator at Crawfordsville for a loan of \$100. Relator, as a condition to making the loan, required surety, whereupon Margaret J. Weaver was tendered in that capacity. Margaret not being present, relator prepared a promissory note in said sum, an affidavit as to the solvency of Margaret, and a certificate that she had signed the note, and entrusted these papers to Sarah to procure their execution. Sarah thereupon went before appellee Reichard, who was a justice of the peace, and resided in a small town near the home of Margaret, and impersonating Margaret, signed and swore to the affidavit in Margaret's name. Reichard signed his name as a justice of the peace to the jurat that relator had written at the bottom of the affidavit. The certificate was apparently written on the same paper as the affidavit and below it. Although Sarah apparently did not exhibit the note to Reichard, he signed the certificate also as a justice of the peace, and affixed his official seal to it. The certificate was as follows: "And I further certify that the above named Margaret Weaver in my presence signed her name to a note of this date executed to Lewellyn J. Coppage by the above named Sarah J. Weaver, for the sum of One Hundred Dollars, due six months from date. John W. Reichard, Justice of the Peace." Thereafter, Sarah presented to relator the affidavit and certificate and the note bearing her name and also Margaret's name as makers, and relator thereupon made the loan. The note proved to be uncollectible by reason of Sarah's insolvency, and the fact that Margaret had not signed it.

It is claimed that Reichard acted carelessly rather than corruptly in the transaction. Under such circumstances, this action was brought against appellees on the official bond

of Reichard, the other appellees being sureties on the bond. The bond, a copy of which is made a part of the complaint, is conditioned as required by the statute for the faithful discharge of the duties of his office by Reichard, and for the payment to the proper persons of all moneys that might come into his hands as such justice of the peace.

It is conceded that the facts stated in the affidavit are true, and that relator was not harmed by Sarah's execution of it in the name of Margaret, and that that instrument is unimportant in the further consideration of this appeal. Appellant's relator expressly states that he relies exclusively on the breach, declared on in the complaint respecting the making of the certificate by Reichard under the circumstances.

Appellees answered in three paragraphs. The second was a general denial. Appellant's demurrer was sustained to the third and overruled to the first, to which a reply in general denial was filed. A trial resulted in a verdict and judgment in favor of appellant for \$25, from which this appeal is prosecuted. Error is assigned on the overruling of the demurrer to the first paragraph of answer, and on the overruling of the motion for a new trial. The first paragraph of answer sets out facts specifically respecting the preparing of the papers by the relator, and the circumstances attending their execution. It was the pleader's purpose to allege facts in said paragraph from which it would follow that the relator was guilty of negligence, by reason of the statements that he included in the papers, and that Reichard was free from fault in permitting them to be executed by Sarah impersonating Margaret. The argument that the paragraph is insufficient is based on the fact however that it contains an allegation in substance that Sarah did not have the note with her at Reichard's office, and that in the transaction of executing the affidavit and the certificate, Reichard did not see the note referred to in the certificate. It is argued that such allegation admits or affirms as true the material averment of

the complaint respecting the breach of the conditions of the bond, and that as a consequence, the court erred in overruling the demurrer to that paragraph.

The complaint is before us, and we are confronted with the question of whether it is our duty to consider its sufficiency in reviewing the ruling of the trial court on

1. the demurrer to said paragraph of answer. The appellant was plaintiff below and assigns error and seeks a reversal here by reason of the adverse ruling on said demurrer. The answer is directed to the complaint. If an appealing plaintiff's complaint fails substantially and fundamentally to state a cause of action, he has in fact no meritorious standing in court, and no reason occurs to us why he should be heard to complain respecting a ruling against him on a demurrer to his answer. To this effect is *State, ex rel. v. State Board, etc.* (1910), 173 Ind. 706, 710, 91 N. E. 338, where the court said: "As the alternative writ was insufficient, it is immaterial whether the second and third paragraphs of answer thereto were good or bad, for the reason that it is settled law in this State that a bad answer is good enough for a bad complaint, and there can be no reversal of a judgment for error in overruling a demurrer to a bad answer if the complaint is insufficient as against a demurrer for want of facts. * * * It follows that the demurrer to said answer should have been carried back and sustained to the alternative writ." See, also, *City of Delphi v. Hamling* (1909), 172 Ind. 645, 648, 89 N. E. 308; *State, ex rel. v. Myers* (1885), 100 Ind. 487; *Alexander v. Spaulding* (1903), 160 Ind. 176, 66 N. E. 694; *Alkire v. Alkire* (1893), 134 Ind. 350, 355, 32 N. E. 571; *Zenor v. Pryor* (1914), 57 Ind. App. 222, 106 N. E. 746. In neither of the cases cited above were cross errors assigned. In *Gould v. Steyer* (1881), 75 Ind. 50, where defendant appellee assigned cross errors on the sustaining of a demurrer to a paragraph of answer, and for failure to carry such demurrer back to the complaint, the court said: "If the complaint

failed to show a sufficient cause of action, the demurrer to the answer reached back to the complaint, and should have been sustained as to it, and not as to the answer. * * * Such a demurrer will search the record and will test the sufficiency of the complaint, even without an assignment of cross errors." The decision is based on *Actna Ins. Co. v. Baker* (1880), 71 Ind. 102. We conclude that it is our duty to inquire into the sufficiency of the complaint.

As we have said, appellant concedes that the breach of the bond relied on is the making of the certificate under the circumstances. The question then confronts us of whether the making of such certificate was an official act or the performance of an official duty, rendering Reichard and sureties on the former's official bond, liable for any damages resulting by reason of such act having been done wrongfully.

"That a surety on an official bond is only answerable

2. for the acts of his principal while engaged in the performance of some duty imposed upon him by law is generally admitted. * * * But where an officer, though he assumes to act as such, commits a wrong under circumstances where the law does not impose upon him any duty to act at all, the wrong is not a violation of any *official duty*, and consequently is not embraced within the sponsorship of the surety." *Hawkins v. Thomas* (1891), 3 Ind.

3. App. 399, 404, 405, 29 N. E. 157. As the suit is on the bond, rather than against Reichard individually aside from the bond, his liability is identical with that of his sureties. If they are not liable in this action, neither is he. *State, ex rel. v. Flynn* (1903), 161 Ind. 554, 562, 69 N. E. 159; *Bowers v. Fleming* (1879), 67 Ind. 541; *McLendon v. State* (1893), 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738, 743. The statute provides that all official bonds shall be obligatory upon the principal and the sureties thereto "for the faithful discharge of all duties required of such officer by any law" (§9111 Burns 1914, §5528 R. S. 1881); and that the official bond of a justice of the peace shall be "con-

ditioned for the faithful discharge of the duties of his office", etc. §1707 Burns 1914, §1421 R. S. 1881. The bond here is conditioned as required by the latter section.

4. The Constitution provides that the powers and duties of justices of the peace shall be prescribed by law. §14, Art. 7, Constitution. Their powers are wholly statutory. *Matlock v. Strange* (1856), 8 Ind. 57; *Willey v. Strickland* (1857), 8 Ind. 453. Instruments of writing pertaining to his official duty, when attested by the official seal and signature of a justice of the peace are presumptive evidence of the official character of such justice of the peace in all courts of the State without further authentication. §1708 Burns 1914, Acts 1905 p. 122. They are authorized to administer oaths in all cases where an oath is required. §9603 Burns 1914, §6010 R. S. 1881. An instrument entitled to record if acknowledged may be acknowledged before a justice of the peace (§3965 Burns 1914, §2933 R. S. 1881), in which case a certificate of acknowledgment must be written on or attached to the instrument. §3085 Burns 1914, §2534 R. S. 1881. Such in brief are the principal ministerial duties and powers of justices of the peace. We know of no statute that authorizes such an officer to execute such a certificate as is involved in this action. It is not a certificate of acknowledgment. *Guyer v. Union Trust Co.* (1914), 55 Ind. App. 472, 485, 104 N. E. 82. If it were sufficient in form as such, it is not attached to or written on the instrument as required by statute. §3085, *supra*. Moreover, there is no statute that requires or authorizes the acknowledgment of a promissory note, or that entitles it to record if acknowledged. If a justice of the peace may officially make such certificate, there is no reason why he may not in his official capacity certify to any event witnessed by him, or that comes within his observation. We hold that in the making of the certificate, Reichard was not discharging any duty of his office within the meaning of his official bond. It follows that the com-

State, ex rel. v. Reichard—59 Ind. App. 338.

plaint does not state a cause of action. The following are in point: *Hawkins v. Thomas, supra*; *Doepfner v. State, ex rel.* (1871), 36 Ind. 111; *State, ex rel. v. Flynn, supra*; *Granger v. Boswinkle* (1912), 50 Ind. App. 114, 116, 96 N. E. 208; *McLendon v. State* (1893), 21 L. R. A. 738, note; *State, ex rel. v. Clausmeier* (1900), 154 Ind. 599, 57 N. E. 541, 77 Am. St. 511, 50 L. R. A. 73; *Feller v. Gates* (1902), 40 Or. 543, 67 Pac. 416, 91 Am. St. 492, 56 L. R. A. 630; 24 Cyc. 429.

Our attention is called to *Tucker v. State* (1904), 163 Ind. 403, 71 N. E. 140, where the statement is made that a public official and his sureties are liable on his official bond for wrongful acts done by color of his office, as well as for those done by virtue of his office. *State, ex rel. v. Walford* (1894), 11 Ind. App. 392, 39 N. E. 162, is cited where practically the same language is used. In neither of these cases does the court determine when it may be said that an act is done by color of office, and in neither is there a decision that an officer involved had done some wrongful act by color of his office. The subject of liability on official bonds for wrongful acts done *virtute officii* and *colore officii* is fully considered and the authorities reviewed in *Hawkins v. Thomas, supra*, and a conclusion reached with which our holding here is in harmony. The cases cited in *State, ex rel. v. Walford, supra*, are not out of line with *Hawkins v. Thomas, supra*.

Here the plaintiff below has appealed. It appears from the record that he has no cause of action against appellees

on the bond. Intervening errors, therefore, if any,

5. must be regarded as harmless. It follows that appellant is not entitled to a more favorable mandate of this court than an affirmance of the judgment. *State, ex rel. v. State Board, etc., supra*; *Zenor v. Pryor, supra*.

Judgment affirmed.

NOTE.—Reported in 109 N. E. 438. As to acts for which sureties on officers' bonds are liable, see 91 Am. St. 497. As to the liability

Princeton Light, etc., Co. v. Ballard—59 Ind. App. 345.

of a surety on bond of public officer for acts wholly outside official duty, see 6 Ann. Cas. 919; Ann. Cas. 1912 C 581. See, also, under (1) 31 Cyc. 338; (2) 29 Cyc. 1455; (3) 29 Cyc. 1454; (4) 24 Cyc. 429, 416; (5) 3 Cyc. 385.

THE PRINCETON LIGHT AND POWER COMPANY v. BALLARD, ADMINISTRATOR.

[No. 8,663. Filed June 23, 1915.]

1. *APPEAL.—Review.—Verdict.—Conclusiveness.*—Where a verdict is rendered on conflicting evidence, it is conclusive if there was no error in the giving or refusing of instructions. p. 347.
2. *ELECTRICITY.—Transmission of Electric Current.—Liability for Injuries.*—Where the furnisher of electricity supplies the same to a customer first through its own wires and then through wires owned and maintained by the customer, and over which the furnisher has no supervision or control, he is not liable for injuries resulting from the negligent manner in which the customer's wires are equipped and maintained. p. 347.
3. *ELECTRICITY.—Transmission of Electric Current.—Liability for Injuries.—Evidence.—Instructions.*—In an action against an electric company for the death of an employe in a railroad shop, to which electric current was supplied by defendant, where the evidence was conflicting as to whether the wires in said shop, alleged to have been negligently maintained, were owned and controlled by defendant, or were owned by and under the immediate care and supervision of decedent's employer, the court erred in refusing instructions advising the jury that defendant was not liable if it was found that such wires were owned and controlled by decedent's employer and that it was no part of defendant's duty to keep same in repair. p. 347.

From Knox Circuit Court; *Orlando H. Cobb*, Judge.

Action by James H. Ballard, administrator of the estate of Henry Rowe, deceased, against The Princeton Light and Power Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

John W. Brady, for appellant.

R. W. Armstrong and *T. W. Cullen*, for appellee.

IBACH, P. J.—Action in tort by appellee to recover damages for the death of his decedent, alleged to have been

caused by appellant's neglect. The material allegations of the complaint are substantially as follows: That on October 27, 1904, appellant operated an electric lighting plant, and furnished and distributed electricity therefrom for lighting at the shops of the Southern Railway Company where Henry Rowe was then working for that company; that appellant furnished and distributed electricity to such shops by means of two wires, one called a primary wire, and one called a secondary wire; that the primary wire then carried 2,200 volts of electricity to a transformer which reduced the voltage to 106 volts and carried the same to the secondary wire, and through it to the place where Henry Rowe was working in the shops, and where an electric wire was suspended from such secondary wire to make light for Henry Rowe while at work; that Henry Rowe tried to turn the electricity from the secondary wire into an electric lamp which hung to such suspended wire, and there received into his body without any fault or negligence of his own 2,200 volts of electricity, because the primary and secondary wires crossed one another so that all the voltage from the primary wire was projected into his body, and appellant then knew and by the exercise of ordinary care could have known of the dangerous voltage passing then and there into such secondary wire; that Henry Rowe died of his injuries and left surviving him as his heirs his parents and brother, to whose support he was contributing at the time of his death.

The issues were closed by the filing of an answer of general denial and an affirmative answer which we need not consider, for it is admitted by appellant that the proof failed to support it. The cause was tried by a jury and a general verdict for appellee was returned, awarding damages in the sum of \$1,000. Judgment was rendered on the verdict.

The reversal of the judgment is sought on the ground that the trial court erred in overruling appellant's motion for a new trial. A number of specifications are assigned in the motion, but in view of our determination of the case we need

only consider the specifications which have to do with the giving of certain instructions to the jury and a refusal to give others. The evidence in the case being conflict-

1. ing, the appellee would be entitled to retain his judgment if there was no error in refusing to give instructions requested by appellant. See *Gilbert v. Duluth Gen. Elec. Co.* (1904), 93 Minn. 99, 100 N. W. 653, 106 Am. St. 430; *Hebert v. Lake Charles Ice, etc., Co* (1903), 111 La. 522, 35 South. 731, 100 Am. St. 505, 64 L. R. A. 101; *Parsons v. Charleston, etc., Elec. Co.* (1904), 69 S. C. 305, 48 S. E. 284, 104 Am. St. 800.

The theory of the complaint, manifest from all of its paragraphs, is that appellant owned and controlled the primary and secondary electric light wires which supplied electric light to the railroad shops from its plant and was negligent in allowing a portion of each to become uninsulated, and come in contact with each other, thus transferring the current of 2,200 volts to the wire intended only to carry 106 volts. A material issue thus presented involved the control and supervision of the electric light wires within the grounds and premises of the railroad company.

It seems to be settled law that where the furnisher of electricity supplies the same to a customer, first through its own

wires and then through the wires owned and maintained by such customer and over which the furnisher had no supervision or control, and an employe of the purchaser is injured by reason of the negligent manner in which the purchaser's wires are equipped and maintained, the party who merely sells the current is not liable. 1 Joyce, *Electricity* (2d ed.) §445c; *Fickeisen v. Wheeling Elec. Co.* (1910), 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. (N. S.) 893; *Memphis, etc., Elec. Co. v. Speers* (1904), 113 Tenn. 83, 81 S. W. 595; *Minneapolis Gen. Elec. Co. v. Cronon* (1908), 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816.

3. There was a sharp conflict in the evidence as to whether the wires in the railroad company's shops

were controlled and maintained by appellant. There was some evidence that the Southern Railway Company alone owned and controlled all the wires alleged to have become defective, and had them under its immediate care and supervision at the time of decedent's injury and for a long time prior thereto, and that appellant had no right or authority to interfere with the manner in which such railroad company maintained its wires and had no right to inspect them and owed no duty to decedent or any other person to make any inspection of the wires complained of. Under this state of the evidence, appellant requested three instructions embracing the legal proposition here propounded, but the court refused to give them, and instructions diametrically opposite thereto were given at the request of appellee, covering his theory of the case. Instruction No. 19 requested by appellant, which is similar in all its essentials to instructions Nos. 18 and 25, also refused, is as follows: "If you find, from a preponderance of the evidence that the wires alleged in the complaint to have been crossed upon each other were the property of the Southern Railway Company, and in possession of said railway company and in actual charge of an electrician employed by it and assigned to the duty of caring for the wires and other electrical appliances within the shop buildings and grounds of said railway company, and that it was no part of the duty of the defendant to keep in repair said wires alleged as aforesaid, to have been crossed as aforesaid; then in that view of the case, the plaintiff can not recover in this action and your verdict should be for the defendant."

In view of the fact that no other instructions covering the same propositions were given, one of the instructions tendered thereon by appellant should have been given, and it was prejudicial error to refuse to do so. Judgment reversed.

NOTE.—Reported in 109 N. E. 405. As to duties and liabilities of electrical corporations, see 100 Am. St. 515. As to liability of electric company for injury by wire strung by a third person to connect with its system, see 39 L. R. A. (N. S.) 1046. As to duty

of electric light company with respect to wiring or fixtures installed in private property, see 13 L. R. A. (N. S.) 226; 20 L. R. A. (N. S.) 816; L. R. A. 1915 C 570. See, also, under (1) 3 Cyc. 348; (2) 15 Cyc. 471; (3) 15 Cyc. 480.

MUNCIE ELECTRIC LIGHT COMPANY v. JOLIFF.

[No. 8,953. Filed June 23, 1915.]

1. **APPEAL.—Assignment of Errors.—Waiver.**—Error assigned, but not presented by appellant's brief, is waived. p. 353.
2. **APPEAL.—Questions Reviewable.—Ruling on Demurrer to Answer.**—No question can be presented on the overruling of a demurrer to a paragraph of answer in the absence of a memorandum of defects accompanying the demurrer. p. 353.
3. **APPEAL.—Review.—Findings.—Evidence.—Determining Sufficiency.**—In determining whether the findings of the trial court are supported by the evidence, the court on appeal will look only to that evidence most favorable to appellee, and if it supports such findings, or warrants an inference of the existence of the facts found, the findings are conclusive. p. 354.
4. **APPEAL.—Review.—Findings.—Evidence.—Sufficiency.**—In a suit to enjoin a landowner from interfering with the construction of electric transmission wires on a railroad right of way across his land, where plaintiff alleged in its original complaint, which was verified, that the railroad company from whom it obtained leave to erect its line of wires owned a "right of way" over defendant's land, and the second paragraph of complaint contained a similar averment, such averments together with a deed introduced in evidence showing a conveyance of the land by the original owner, in which it was recited that the right of way "heretofore acquired by agreement of the grantor" was not included in the warranty, as well as other deeds tracing defendant's title back to such original owner, constituted sufficient evidence to warrant a finding that defendant was the owner in fee simple of the land embraced in the right of way subject only to the right of way or easement for railroad purposes. p. 355.
5. **RAILROADS.—Right of Way.—Effect of Grant.—Ownership of Fee.**—The grant of a railroad right of way is the grant of an easement and implies that the fee remains in the grantor. p. 355.
6. **ESTOPPEL.—By Deed.—Title of Remote Grantor.**—Neither party to an action involving a question of title can question the title of the common grantor to whom they trace their source of title. p. 355.

7. *INJUNCTION.—Burden of Proof.—Findings.—Review.*—In a suit to enjoin a landowner from interfering with the construction of plaintiff's line of electric transmission wires on a railroad right of way over defendant's land, plaintiff was required to come into court with clean hands in order to obtain the relief sought, and had the burden of proving its authority to erect its line of wires on such right of way by showing that such authority came from one having the right to give or confer it, and, in the absence of affirmative proof of such authority, the court was warranted either in finding against plaintiff as to such fact or in permitting the finding to be silent with reference thereto; hence, in such an action a finding against plaintiff on such question of authority can not be disturbed even if there is no affirmative evidence to support it. pp. 356, 363.
8. *INJUNCTION.—Issues.—Burden of Proof.*—In a suit to enjoin a landowner from interfering with the construction of plaintiff's line of electric transmission wires on a railroad right of way over defendant's line, the burden of proving plaintiff's right to construct its line over the land in question was continuously on plaintiff, so that a finding that plaintiff obtained permission from the railroad company did not shift to defendant the burden of proving that the railroad company had no authority to grant such permission. p. 357.
9. *APPEAL.—Review.—Findings.*—In a suit to enjoin a landowner from interfering with the construction of plaintiff's line of electric transmission wires on a railroad right of way over defendant's land, where the railroad company was not the owner of the fee, it was without authority to grant plaintiff the right to construct its line on such right of way, so that a finding that as to such fee and the owner thereof the plaintiff stood in the relation of a trespasser was correct, though not essential to justify the conclusions stated against plaintiff. p. 357.
10. *INJUNCTION.—Evidence.—Estoppel.*—In a suit to enjoin defendant from interfering with the maintenance of plaintiff's line of electric wires over defendant's land, evidence that defendant made objection to plaintiff's employees who were actually engaged in the work of constructing the line along with those who were in immediate charge of the work was sufficient to prevent defendant from being estopped on the ground of standing by and seeing the work progress. p. 358.
11. *APPEAL.—Presenting Questions for Review.—Findings and Conclusions of Law.*—A special finding of facts and conclusions of law can be brought in review only by exceptions to the conclusions of law, but where appellant properly excepted to the conclusions and has properly presented the same by its assignment of errors, and has also attempted on its motion for new trial to raise the

Muncie Electric Light Co. v. Joliff—59 Ind. App. 349.

question that the decision of the trial court is contrary to law, stating in connection therewith that this ground for new trial raises the same question as the assignment of errors challenging the conclusions of law, the court will regard what appellant says under such ground for new trial as being also intended to challenge the correctness of the conclusions of law. p. 358.

12. **ELECTRICITY.—Transmission Lines.—Right to Construct on Railroad Right of Way.—Statutes.—“Roads”.—“Highways”.—“Railroad”.—**Section 38 of the act of 1905, as amended in 1911 (Acts 1911 p. 421, §7686 Burns 1914), authorizing telephone companies and companies organized for generating and distributing electricity to construct their lines upon any of the public roads and highways of the State, does not authorize an electric company to construct its lines on the right of way of a railroad company without the permission of the owner of the fee, since, though the terms “roads” and “highways” are generic and are ordinarily understood to mean all kinds of public ways, including railroads, the terms are used in the statute in a restrictive sense and were intended to mean only such highways as are used by the public for ordinary travel, and which are under the control of the board of county commissioners, and a railroad is not a public highway in the sense that a country road for wagons and vehicles, or a street of like character in a town or city, is recognized. pp. 359, 361, 362.
13. **STATUTES.—Construction.—Reënactment.**—Where a statute has been construed by the Supreme Court the subsequent reënactment thereof will be deemed to have included the legislative adoption of such construction, unless a clear intent to the contrary is manifest by the statute as reënacted. p. 360.
14. **STATUTES.—Construction.—Legislative Intent.**—In interpreting a statute and giving meaning to any particular words, phrases or sentences therein, due regard must be had to the entire context, and that meaning should be adopted which best harmonizes with all parts of the statute; and the intent of the legislature should also be of controlling influence where the words of the act are such as to permit the carrying out of such intent. p. 362.

From Delaware Superior Court; *James J. Moran*, Special Judge.

Action by the Muncie Electric Light Company against Joseph C. Joliff. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

William F. White and *William T. Haymond*, for appellant.
Wilbur Ryman and *Leffner, Bell & Needham*, for appellee.

HOTTEL, J.—The nature and history of the occurrences which led up to the litigation in which this appeal was taken, and the character of the pleadings tendering the issues on which the case was tried below, briefly stated, are as follows: The appellant is a public service corporation engaged in the business of generating, transmitting and selling electric energy for light, heat and power purposes. It has its principal office and place of business at Muncie, Indiana, and it there generates electricity used by it and its customers. It also has substations for the generation and distribution of such current at the towns of Eaton, Red Key, Dunkirk and Hartford City, Indiana. In the month of September, 1911, and prior thereto appellant was engaged in constructing a transmission line on a private way from its plant in Muncie to its plants in Eaton and Hartford City, and then to Dunkirk and Red Key. This private way over which it was constructing such line was located immediately west of, and adjacent to, the right of way of the Fort Wayne, Cincinnati and Louisville Railroad Company, known as the Lake Erie and Western Railroad. Prior to September, 1911, appellant had procured a private right of way for such line between Muncie and Hartford City from all the owners of the land over which it passed except from appellee, and three others. Having failed in its negotiations with appellee to secure a right of way over his farm, appellant filed condemnation proceedings for that purpose. Pending such proceedings appellant pursuant to permission obtained from said railroad companies constructed its transmission line on their right of way through appellee's land. Later appellant turned its current into such transmission line and proceeded to construct a private telephone line on its poles for the use of its workmen. Appellee objected to such construction and cut the line at a point thereon where his farm crossing passes over the railroad right of way. Appellant then filed its sworn complaint in this cause and procured a temporary restraining order, restraining the appellee from further inter-

fering with such line. Thereafter a motion by appellee to dissolve the restraining order was overruled and a temporary injunction was granted appellant until the final hearing of the case. A second paragraph of complaint was then filed. A demurrer to each paragraph of complaint was overruled, and answer in general denial and an affirmative answer filed. A demurrer to each of the affirmative answers was overruled. A reply in general denial closed the issues. There was a trial by court and a special finding of facts and conclusions of law in appellee's favor. A motion for new trial was overruled and judgment rendered for appellee on the finding.

The errors assigned are, (1) overruling appellant's motion for a new trial; (2) overruling appellant's demurrer to each paragraph of appellee's answer to the first and

1. second paragraphs of complaint; (3-5) the court erred in its conclusions of law, one, two and three, respectively. The second assigned error is not presented by appellant's brief and is therefore waived.

We might add that no memorandum accompanies either demurrer and for this reason no question could be presented on such rulings. Acts 1911 p. 415, §344 Burns 1914.

The length of the finding forbids its incorporation in this opinion, except in so far as necessary to an understanding of the questions presented by the appeal, and the disposition made thereof. The substance of the particular findings objected to by appellant is as follows: (1-3) On, before, and after September 4, 1911, Joseph C. Joliff and Lulu B. Joliff, his wife, hereinafter referred to as the "Joliffs", were the owners in fee simple of the following described real estate (here follows description), subject only to an easement, or railroad right of way owned by the Fort Wayne, Cincinnati and Louisville Railroad Company, and operated by the Lake Erie and Western Railroad Company. Neither of said companies has or holds any right or interest in said right of way other than a right of way or easement for railroad purposes,

and such right of way is located on and across the real estate of the Joliffs, above described. (19) At the time appellant entered upon said right of way on the land in question on September 3, it was, and continuously since that time has been, a "trespasser upon the fee simple interest in and to the said lands where said poles were so placed and said wires so strung thereon as held and owned by" the Joliffs. (24) On Sunday morning, September 1, 1911, the Joliffs knew that appellant entered, or was about to enter, upon that part of their land occupied by the railroad companies for right of way purposes, and before the Joliffs informed appellant that they were the owners of the right of way appellant made several holes and had placed in them poles upon which was intended to be strung the wires for the transmission of electricity. However, before there was but a very small amount of labor performed and but very little money expended, the Joliffs ordered the servants of appellant who were in charge of the construction work to desist their labor and informed appellant that they were the owners of the fee in the right of way, but such servants of appellant refused to quit such work or to leave the premises.

The conclusions of law are as follows: "First. That the law is with the defendant, and against the plaintiff. Second. That the plaintiff is not entitled to recover in this case against the defendant, and is not entitled to have an injunction against the defendant, and that the restraining order heretofore issued in said cause should be dissolved. Third. That the defendant is entitled to recover his costs against the plaintiff in this case."

In support of its contention that the trial court erred in overruling its motion for new trial it is first insisted by appellant that findings 1, 2 and 3 are not supported

3. by the evidence. It is asserted that there is no evidence, either that the railroad company *did not own* a fee in its right of way over the land in question, or that appellee did own the fee therein. We can not agree with

this contention. In determining such question this court will look only to that evidence most favorable to appellee, and if it supports such findings, or is such as to have warranted the trial court in inferring the existence of the fact so found by it, this court will be bound by such findings. *Lake Erie, etc., R. Co. v. Voliva* (1913), 53 Ind. App. 170, 177, 101 N. E. 338; *Schaffner v. Voss* (1910), 46 Ind. App.

551, 557, 93 N. E. 235. We think there was affirmative

4. tive evidence which justified the findings indicated.

The appellant in its original complaint, which is verified, alleges, in effect, that the railroad company which granted it permission to place its poles and transmission line on the right of way in question owned a *right of way* over said land. The second paragraph of complaint contains a similar averment. "The grant of a right of way

5. is the grant of an easement and implies that the fee remains in the grantor." *Cincinnati, etc., R.*

Co. v. Geisel (1888), 119 Ind. 77, 21 N. E. 470. See, also, *Chicago, etc., R. Co. v. Huncheon* (1892), 130 Ind. 529, 30 N. E. 636; *Quick v. Taylor* (1888), 113 Ind. 540, 16 N. E. 588; *Pfaff v. Terre Haute, etc., R. Co.* (1886), 108 Ind. 144, 148, 9 N. E. 93; *Williams v. Western Union R. Co.* (1880), 50 Wis. 71, 76, 5 N. W. 482; *Brown v. Young* (1886), 69 Iowa 625, 29 N. W. 941; *Bosley v. Susquehanna Canal Co.* (1830), 3 Bland (Md.) 63, 67; *Uhl v. Ohio River R. Co.* (1902), 51 W. Va. 106, 110, 41 S. E. 340, 33 Cyc. 166, 167; 6 Am. and Eng. Ency. Law 530, 531; 7 Words and Phrases 6230

Appellant introduced, in support of the railroad company's title to its right of way, a deed from Samuel Martin to Maxwell M. C. Smell, in which there was the fol-

4. lowing recital: "Not warranting however herein against the right of way of the Fort Wayne, Muncie and Cincinnati Railway Company heretofore acquired

6. by agreement of the grantor, Samuel Martin, dated March 17, 1869." Through various intermediate

deeds appellee traces his title to the same source, and hence

neither appellant nor appellee will be permitted to question the title of the common grantor to whom they trace their source of title. *Pierson v. Doe* (1850), 2 Ind. *123, *125; *Wright v. Tichenor* (1885), 104 Ind. 185, 187, 3 N. E. 853, and cases cited; *Brandenburg v. Seigfried* (1881), 75 Ind. 568, 569; *McWhorter v. Heltzell* (1890), 124 Ind. 129, 131, 24 N. E. 743. The deed from Martin introduced by appellant, especially when taken in connection with the other deeds introduced in evidence, and the averments of appellant's complaint and all the other evidence in the case is, we think, sufficient to warrant the court's affirmative finding that appellant was the owner of the easement, or a right of way only, over the land in question and that appellee was the owner of the fee in such right of way. The record shows that Charles Fudge, appellee's immediate grantor was in possession of the land in question at the time he deeded it to appellee and wife. This, in connection with the other evidence indicated, was a sufficient showing as far as appellee's title is concerned. *Peck v. Louisville, etc., R. Co.* (1885), 101 Ind. 366, and cases cited.

However, even if there were no affirmative evidence showing that the appellant was not the owner of the fee in such right of way, the finding of such fact is nevertheless

7. justified under the issues tendered. Appellant invoked the equity side of the court and asked injunctive relief against appellee and hence the burden was on it to allege and prove its right and authority to ask such court that it interpose to prevent and enjoin appellee's threatened act. The litigant who comes into a court of equity must come with clean hands. He must show that he is not a trespasser himself before he can hope to have extended to him the aid of such a court to prevent or interfere with the acts of another trespasser. *Ilo Oil Co. v. Indiana Nat. Gas, etc., Co.* (1910), 174 Ind. 635, 637, 92 N. E. 1, 30 L. R. A. (N. S.) 1057, and cases cited; *Windfall, etc., Oil Co. v. Terwilliger* (1899), 152 Ind. 364, 366, 367, 53 N. E. 284. The

Muncie Electric Light Co. v. Joliff—59 Ind. App. 349.

burden being on appellant to prove its authority to place its poles on the right of way in question it devolved on it to show that such authority came from one who had the right to give it or confer it, and in the absence of affirmative proof of such fact, the trial court was justified in doing either of two things, viz., it could do as it did in this case, expressly find against the party having the burden of proving such fact, or it could do what would amount to the same thing, viz., permit its finding to be silent on such fact. *National Surety Co. v. State, ex rel.* (1914), 181 Ind. 54, 67, 103 N. E. 105; *Sanderson v. Trump Mfg. Co.* (1913), 180 Ind. 197, 224, 102 N. E. 2; *Deemer v. Knight* (1914), 55 Ind. App. 397, 398, 103 N. E. 868. Under the issues as here tendered the

8. finding that appellant obtained permission of the railroad company to construct its line along such right of way did not shift to appellee the burden of proving that such railroad company did not have authority to grant such permission. Such burden was from the beginning and continuously on the appellant. *Pittsburgh, etc., R. Co. v. Town of Crothersville* (1902), 159 Ind. 330, 332, 334, 64 N. E. 914.

Finding 19 is objected to, but such objections are, in effect, disposed of by our disposition of the objections to the other findings. If the railroad company which granted to

9. appellant its permission to construct its line over such right of way did not itself own the fee and was without authority to grant such permission it follows that as to the fee in such right of way and the owner thereof, appellant stood in the relation of trespasser and hence finding 19 is correct. *Windfall, etc., Oil Co. v. Terwilliger, supra.* It is insisted, however, that this finding is purely a conclusion of law and hence can not aid the other findings. Assuming, without so deciding, that this is true, yet, if what we have said before be correct, such finding was not essential and it may be entirely disregarded and there will still remain enough facts found by the court to justify the conclusions of law stated thereon.

Finding 24 is objected to, on the ground that it "assumes that appellee informed or notified appellant that his wife and he were the owners of the right of way after several holes were dug". It is insisted that there was no evidence of such fact. It is admitted by appellant that appellee testified in effect that when he saw the laborers at work there on the railroad he learned from them for whom they were working and said to them collectively, "You people have no business digging those holes there. That right of way belongs to me." There was other evidence showing that appellee objected to the erection of such transmission line. An objection made to the appellant's employes who were actually engaged in the work of placing the poles and transmission line on appellee's land along with those who were in immediate charge of the work was sufficient, at least, to prevent appellee from being estopped on account of standing by and seeing the work progress. See *Heck v. Greenwood Tel. Co.* (1905), 35 Ind. App. 244, 73 N. E. 960.

The second question attempted to be raised by appellant on its motion for new trial is that the decision of the trial court is contrary to law. Appellee makes some objections to appellant's manner of presenting this question because appellant assumes, and, in fact, states, that "this ground for a new trial raises the same question in this case" as its assignment challenging the several conclusions of law. It is true, as appellee contends that, strictly speaking, a special finding of facts and conclusions of law can be brought in review only by exceptions to the conclusions of law. *Royse v. Bourne* (1897), 149 Ind. 187, 189, 47 N. E. 827; *Nelson v. Cottingham* (1899), 152 Ind. 135, 136, 137, 52 N. E. 702; *Allen v. Hollingshead* (1900), 155 Ind. 178, 186, 57 N. E. 917; *Maynard v. Waidlich* (1901), 156 Ind. 562, 565, 63 N. E. 48. In this case appellant properly excepted to the conclusions of law and has properly presented such conclusions for review in this court by its assignment of errors. We will therefore treat what it says,

Muncie Electric Light Co. v. Joliff—59 Ind. App. 349.

under such ground of its motion for new trial, as being intended to challenge also the correctness of such conclusions of law.

It is contended by appellant, in effect, that its right to construct its transmission line along the right of way of the railroad company was given it by statute, and that

12. appellee's only remedy was an action for damages.

This contention is based on §38 of "An act concerning highways", approved March 8, 1905 (Acts 1905 p. 521, §7686 Burns 1908), amended in 1911 (Acts 1911 p. 421, §7686 Burns 1914). Section 38 of the act of 1905, *supra*, provides as follows: "That corporations organized for the purpose of constructing, operating and maintaining telephone lines and telephone exchanges are authorized to set and maintain their poles, posts, piers, abutments, wires and other appliances or fixtures, upon, along, under and across any of the public roads, highways and waters of this state, outside of cities and incorporated towns; and individuals owning telephone lines are hereby given the same authority: *Provided*, That the same shall be erected and maintained in such manner as not to incommode the public in the use of such roads, highways and waters: *Provided, also*, That no pole or appliance shall be so located as to interfere with the ingress or egress from any premises on said road, highway or waters: *Provided, further*, That nothing herein contained shall be construed as depriving the county commissioners of any county of the power to require the relocation of any such pole, poles or appliances which may affect the proper uses of such highway for public travel, for drainage, or for the concurrent use of other telephone lines; that the location and setting of said poles shall be under the supervision of the board of commissioners of the county." This section was amended by the act of 1911, *supra*, so as to extend the same rights to *companies organized for the purposes of generating and distributing electricity for light, heat and power*.

It is insisted that a railroad right of way in Indiana is

one of the State's public highways (citing *City of Aurora v. West* [1857], 9 Ind. 74, 85, 86; *Evansville, etc., R. Co. v. City of Evansville* [1860], 15 Ind. 395, 411, and *Strange v. Board, etc.* [1910], 173 Ind. 640, 652, 91 N. E. 242); that in the latter case the Supreme Court before the passage of the act of 1911, *supra*, amending the act of 1905, *supra*, expressly defined the word "highway" as used in the act of 1905, as follows: "Roads and highways are generic terms, embracing all kinds of public ways, such as county and township roads, * * * turnpikes and gravel roads, tramways, ferries, canals, navigable rivers, including also railroads." It is argued that the legislature of 1911 in its amendment of §38, *supra*, must be presumed to have acted with the Supreme Court's interpretation of the meaning of the words "public roads and highways" in mind, and to have ascribed to such words the meaning that had been given them by the Supreme Court and that inasmuch as the findings show that appellant was engaged in a business included within the amended act of 1911, *supra*, it is protected thereby. In support of this conclusion appellant relies on the following cases: *Pierce v. Drew* (1883), 136 Mass. 75, 49 Am. Rep. 7, 8, 11; *Pensacola Tel. Co. v. Western Union Tel. Co.* (1877), 96 U. S. 1, 24 L. Ed. 708; *Attorney General v. Metropolitan R. Co.* (1878), 125 Mass. 515, 28 Am. Rep. 264; *Burkam v. Ohio, etc., R. Co.* (1890), 122 Ind. 344, 346, 23 N. E. 499; *In re Philadelphia, etc., R. Co.* (1840), 6 Whart. (Pa.) 25, 36 Am. Dec. 202, 209; *State, ex rel. v. Board, etc.* (1908), 170 Ind. 595, 608, 609, 85 N. E. 513; *Lexington, etc., R. Co. v. Applegate* (1839), 8 Dana (Ky.) 289, 33 Am. Dec. 497. In none of these cases was the question now under consideration before the court.

It is true, as appellee contends, that where the courts have construed a section or a part of a section of a statute and the legislature afterwards reenacts such statute, or

13. the construed portion thereof, the legislature will be deemed to have adopted that meaning and construc-

tion of such statute or reënacted portion thereof

12. placed thereon by the Supreme Court unless the contrary is clearly shown by the language of the reënacted statute, and in so far as such reënacted statute uses the same language used in the former statute it will be presumed to have ascribed to such language the meaning given it by such court, unless a clear intention to the contrary is made manifest by the act itself. *Ross v. Hanna* (1910), 173 Ind. 671, 91 N. E. 232; *State v. Ensley* (1912), 177 Ind. 483, 489, 490, 97 N. E. 113; Ann. Cas. 1914 D 1306, and cases cited.

The case of *Evansville, etc., R. Co. v. City of Evansville, supra*, was a case where the city was sued on a subscription contract for stock in a railroad company executed by the mayor pursuant to an order of the common council of such city. By the charter of the city the common council was authorized "to take stock in any chartered company for making" roads "to said city". The case of *City of Aurora v. West, supra*, was very similar in its facts. The court in those cases very properly held that the word "roads" as used in the charters of such cities included railroads and hence upheld the stock subscription contracts. It is apparent that these cases can have no controlling influence as to the meaning of the word "highways" as used in the section of the statute under consideration. The case of *Strange v. Board, etc., supra*, was an action by a taxpayer and freeholder to enjoin the board of commissioners from letting a contract to pave with brick a highway less than three miles in length outside of a city or town pursuant to an election held under the highway act of 1907, being §7719 Burns 1908, Acts 1907 p. 68. The court in that case in speaking of the highway act of 1905, *supra*, defined the word "highway" as above indicated; but an examination of the case will show such definition had no reference to the meaning of the word as used in §38 of such act. Indeed, the definition on its face shows that the court had in mind an inclusive definition rather than

an exclusive definition as evidenced by the words "are generic terms embracing all kinds of public ways". The statute in question by its express provisions shows a restricted use of the word, viz., such *public* highways as are *under the control of the board of commissioners*.

The canons of construction require that in interpreting a statute and in giving meaning to any particular words, phrases or sentences therein due regard must always

14. be had to the entire context, and that meaning should be adopted which best harmonizes with all parts of the statute. *Storms v. Stevens* (1885), 104 Ind. 46, 3 N. E. 401; *Seiler v. State, ex rel.* (1903), 160 Ind. 605, 613, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448; *Bank v. Collector* (1865), 70 U. S. 495; *In re Corby's Estate* (1908), 154 Mich. 353, 117 N. W. 906; *United States v. Baltimore, etc., R. Co.* (1908), 159 Fed. 33, 86 C. C. A. 223; *Fisher v. McGirr* (1854), 67 Mass. 1, 61 Am. Dec. 381; *Philadelphia v. Barber* (1894), 160 Pa. St. 123, 28 Atl. 644; 36 Cyc. 1131, and authorities cited. The intent of the legislature should also be of controlling influence, where the words of the act are such as will permit the carrying out of such intent. *Storms v. Stevens, supra*; *Smith v. Andrew* (1912), 50 Ind. App. 602, 605, 98 N. E. 734, and cases cited.

When the act in question is read in its entirety it is manifest that the legislature by the word "highways" as therein used, intended such highways only as are used by the

12. public for ordinary travel, and which are under the control of the board of commissioners of the county; and had no thought or intention of including roads owned by railroad companies or other corporations, such roads being but *quasi* public in character, and not under the general control or supervision of the county commissioners. In this connection we might add that it is questionable whether the legislature, if it had so intended, could have granted to appellant and like companies the power of appropriating in the manner claimed, and without the owners consent, *the fee* in

the right of ways of the railroad companies of the State, except by proper proceedings and upon payment of compensation therefor. *Postal Tel., etc., Co. v. Chicago, etc., R. Co.* (1903), 30 Ind. App. 654, 661, 66 N. E. 919; *Kincaid v. Indianapolis Nat. Gas Co.* (1890), 124 Ind. 577, 24 N. E. 1060, 19 Am. St. 113, 8 L. R. A. 602; *Terre Haute, etc., R. Co. v. Bissell* (1886), 108 Ind. 113, 9 N. E. 144, and cases cited. However, whether the legislature by the act in question could have granted the authority claimed by appellant is not of controlling influence in the instant case; because as before stated it is manifest that such act was never intended to and does not in fact confer such power. A railroad is not, in law, generally recognized as a public highway in the sense that a country road for wagons and vehicles or a street of like character in a town or city is recognized. 33 Cyc. 38; *Comer v. State* (1878), 62 Ala. 320; *Hyde v. Missouri Pac. R. Co.* (1892), 110 Mo. 272, 19 S. W. 483.

There being no authority under which appellant could appropriate the fee in appellee's land or place thereon the additional burden of its transmission line, constructed

7. without appellee's consent, it must follow that it is in no position to invoke the court's summary interference to prevent appellee's attempts and threatened attempts to rid himself of the burden so wrongfully placed on his land. *Postal Tel. Cable Co. v. Eaton* (1897), 170 Ill. 513, 49 N. E. 365, 62 Am. St. 390, 29 L. R. A. 722, 724; *Burl v. American Tel., etc., Co.* (1906), 224 Ill. 266, 79 N. E. 705, 8 L. R. A. (N. S.) 1091; *McGee v. Overshiner* (1898), 150 Ind. 127, 133, 134, 49 N. E. 951, 65 Am. St. 358, 40 L. R. A. 370; *Kincaid v. Indianapolis Nat. Gas Co., supra.*

It might be stated also, in this connection, that it is manifest from finding 22 of the trial court that appellant did not confine its transmission line to the right of way of the railroad company; but, on the contrary, both on the north and south ends of appellee's land, extended its line over on appellee's land some five or six feet, and hence as to that part

 Clymer v. State, ex rel.—59 Ind. App. 364.

of its line it was in no event protected by the authority claimed by it from said railroad company and from the statute in question.

Judgment affirmed. Moran, J., not participating.

NOTE.—Reported in 109 N. E. 433. As to grant of easement by implication, see 122 Am. St. 206. For uses to which railroad right of way may be devoted as against the owner of the fee, see 36 L. R. A. (N. S.) 512. As to the right of a railroad company to permit use of right of way or station grounds by private individuals, see Ann. Cas. 1912 A 180. As to the right of one of two parties deriving title from common source to assert paramount title as against other party, see 16 Ann. Cas. 652. See, also, under (1) 3 C. J. 1410; 2 Cyc. 1014; (2) 31 Cyc. 316; (3) 3 Cyc. 370; (5) 22 Cyc. 940; (6) 16 Cyc. 716; (7) 22 Cyc. 937; (8) 22 Cyc. 937; 16 Cyc. 926; (9) 33 Cyc. 220; (10) 16 Cyc. 765; (11) 3 C. J. 933-938; 2 Cyc. 730, 728; 38 Cyc. 1990; (12) 15 Cyc. 469, 612; (13) 36 Cyc. 1153; (14) 36 Cyc. 1106.

CLYMER v. STATE OF INDIANA, EX REL. HEIN ET AL.

[No. 8,626. Filed June 24, 1915.]

1. GUARDIAN AND WARD.—*Bond.—Power to Require Additional Security.*—The court may order a guardian to execute a new bond at any time it believes the assets of the estate are insecure. p. 369.
2. GUARDIAN AND WARD.—*Liability on Bond.—Release of Surety.—Statutes.*—Where a guardian, on procuring an order to sell his ward's real estate, was required to execute bond, and then upon the approval of the report of sale an order was made by the court on its own motion releasing and discharging the sureties on such bond, and such guardian thereupon filed a new bond, such order of release was ineffective to relieve the sureties from subsequent liability on the bond, since the beneficiary in such a bond has a vested interest therein and it will remain in full force unless the release is procured upon application and notice as provided by statute. p. 369.
3. GUARDIAN AND WARD.—*Liability on Bonds.—Discharge of Sureties.*—Where a surety on a guardian's bond was released by the court, such release did not operate to relieve from liability the surety on an additional bond executed by the guardian to protect the proceeds arising from a sale of real estate. p. 370.

From Newton Circuit Court; Charles W. Hanley, Judge.

Clymer v. State, ex rel.—59 Ind. App. 364.

Action by the State of Indiana, on the relation of Frederick Wein and another, against William T. Beahler and others. From a judgment for relators, the defendant named appeals. *Affirmed.*

Stuart, Hammond & Simms, for appellant.

Frank Foltz, for appellees.

SHEA, C. J.—This action was brought by the State of Indiana on the relation of Frederick and Emma Wein to recover upon certain guardian's bonds executed by William T. Beahler as principal, and Fred D. Gilman, Elmer R. Bringham, Ziba F. Little, William A. Bringham and appellant Glasco D. Clymer, as sureties, for alleged breaches of the conditions of said bonds. Numerous paragraphs of complaint, answer and reply were filed, which we need not here set out.

Upon proper request, the court made a special finding of facts and stated conclusions of law thereon, the substance of which is as follows: On May 3, 1901, William T. Beahler was, by the Jasper Circuit Court appointed guardian of Dellie Wein, Frederick Wein and Emma Wein, minor heirs of Hester Wein, deceased, and executed his guardian bond in the penal sum of \$1,200, with Fred D. Gilman and Ziba F. Little as sureties. At the time of said appointment, the personal property of said wards was of the probable value of \$50 and the real estate of the probable value of \$4,000. On September 25, 1901, said guardian filed his petition praying an order authorizing him to sell certain real estate belonging to said wards on the ground that a better investment could be made. Said real estate was duly appraised at \$4,620, and the court ordered the guardian to file an additional bond in the penal sum of \$10,000. On September 27, 1901, said guardian filed his additional bond in the penal sum of \$10,000 with Fred D. Gilman and appellant Glasco D. Clymer as sureties thereon, which bond was conditioned according to law, and was duly approved by the court, where-

upon the court ordered the guardian to sell the real estate and make due report of his acts in the premises to the court.

On November 13, 1901, said guardian further petitioned the court for an order to sell certain other real estate belonging to the wards, upon the ground that a better investment could be made, and filed in connection therewith an appraisal of the last described real estate at \$300, at the same time filing his bond in the penal sum of \$600 with Fred D. Gilman and William A. Bringham as sureties thereon, which bond was duly conditioned according to law and approved by the court, and thereupon the court ordered the guardian to sell said real estate at private sale without notice. On March 5, 1902, said guardian reported the sale of the first mentioned real estate for \$4,649.50 cash, which he brought into court, and asked that his acts in the premises be approved and confirmed. The court approved said report and duly ratified and confirmed said sale, ordered deed executed, examined and approved the deed, and ordered the proceeds arising from such sale paid to the guardian, and that he be charged with said amount, and the additional bondsmen for the sale of this real estate, Fred D. Gilman and appellant Glasco D. Clymer were thereupon, by order of said court released and discharged from said bond. The order so releasing said bondsmen was without any petition, and without notice of an application to be discharged as such, but was upon an order of court made upon its own motion, and said guardian thereupon filed new bond in the penal sum of \$10,000 with Fred D. Gilman and Elmer R. Bringham as sureties thereon, duly conditioned according to law, which was examined and approved by the court. The report of said sale, its examination and approval by the court, the release of said bondsmen Gilman and Clymer and the filing and approval of the last mentioned bond, were all made in one and the same order of court, on March 5, 1902. On November 14, 1902, said guardian filed his petition asking authority to place his ward Emma Wein

Clymer v. State, ex rel.—59 Ind. App. 364.

in a school for girls for at least a year, which petition was approved by the court, and he was ordered and authorized to place said ward in school. On September 14, 1903, said guardian filed current report in said guardianship, showing receipts by him as such guardian for and on behalf of all of said wards in the aggregate sum of \$5,163.73; that each of said wards was entitled to one-third thereof; that he was entitled to a credit as against Dellie Wein in the sum of \$120.49, leaving a balance due her upon said date from said guardian of \$1,600.75; that he was entitled to a credit against his ward Frederick Wein the sum of \$93.99, leaving a balance due him from said guardian on said date of \$1,627.25; that he was entitled to a credit as against his ward Emma Wein in the sum of \$677.53, leaving a balance due her from said guardian on said date of \$1,050.71; which report was duly examined and approved by the court, and said trust was continued and the order theretofore entered providing for expenses for school of said ward Emma Wein was continued for another year. On December 5, 1903, Ziba F. Little, one of the bondsmen upon the first mentioned bond filed a petition in said court praying an order relasing him therefrom, upon which petition it was duly ordered that said Ziba F. Little be, and he was thereby discharged from any further liability on said bond. On September 19, 1905, said guardian was ordered to make a final report as to his ward Dellie Wein, and a current report as to his wards Frederick Wein and Emma Wein on or before October 2, 1905. On February 4, 1906, said guardian filed his final report as to Dellie Wein, and his current report as to the wards Frederick Wein and Emma Wein showing balance due Frederick Wein in his hands, after deducting credits against him, of \$1,692.20, and a balance due Emma Wein, after deducting credits against her, of \$850.28, which report was duly examined and approved by the court. On February 28, 1907, said guardian reported the sale of the real estate last ordered sold for the sum of \$200, which

report was examined and approved by the court, deed ordered, reported and approved, and said guardian was duly charged with the amount of said purchase price of the real estate. On September 15, 1909, the court, upon petition of Frederick Wein, ordered said guardian to file his report in said cause on or before the second Monday of said term; that said guardian made no other or further reports or accountings than those set forth, and is now, and for four years last past has been a nonresident of the State of Indiana; that said guardian has made no payment or accounting with his ward Emma Wein since February 14, 1906, and no payment or accounting to his ward Frederick Wein since February 14, 1906.

Upon these facts the court stated its conclusions of law to be: (1) that the law is with the relators; (2) that Frederick Wein is entitled to recover from defendants Elmer R. Bringham, Glasco D. Clymer and Fred D. Gilman the sum of \$2,394.50; (3) that Frederick Wein is entitled to recover from defendants William A. Bringham and Fred D. Gilman the sum of \$135.50; (4) that Emma Wein is entitled to recover from defendants Elmer R. Bringham, Glasco D. Clymer and Fred D. Gilman the sum of \$1,203.09; (5) that Emma Wein is entitled to recover of and from defendants William A. Bringham and Fred D. Gilman the sum of \$135.50; (6) that defendant Ziba F. Little is entitled to recover his costs. Judgment was rendered accordingly.

Exceptions were duly saved to each conclusion of law stated upon the special findings of fact, and are here assigned as error. The conclusion reached with respect to the effect of the court's order in releasing or discharging the sureties on the bond executed on September 27, 1901, with penalty of \$10,000, Fred D. Gilman and appellant Clymer being sureties thereon, will dispose of the questions involved in this appeal. It is very ably argued that the release of the appellant by a formal order of the court at the time the

second bond was executed, was valid and binding, as to all liability occurring subsequent to that time.

We think it is clear from the language of the court's order that it was the intention to release the sureties on the old bond, and make the new bond substitutional,

1. rather than additional. That the court had the right to order a new bond at any time it might believe the
2. assets of the estate were insecure because of insufficiency of the bond, is undisputed (§3063 Burns 1914, Acts 1889 p. 289), but it is very earnestly argued that the execution of a new bond would not relieve the prior bond from liability for subsequent defalcation, unless the provisions of the statute were strictly followed, that is to say, the sureties must have made application to the clerk, and the guardian must have received ten days' notice. Section 3061 Burns 1914, §2517 R. S. 1881, provides for the release of sureties on a guardian's bond by the same rule as sureties on administrators' and executors' bonds are discharged. So much of §2769 Burns 1914, §2252 R. S. 1881, as applies to the questions under consideration reads as follows: "Any surety upon any bond of any executor, administrator, administrator with the will annexed, or *de bonis non*, may apply to the circuit court approving such bond to be released therefrom, by filing his request therefor with the clerk of said court, and giving ten days' notice thereof to the principal in such bond." The statute requires notice to be given to the principal only.

It is earnestly argued in behalf of appellants that the notice required is intended to give the court jurisdiction of the person of the principal, and therefore if the court had or acquired jurisdiction of the person in some other way, the order made is valid and binding upon all the parties, as the court, without doubt, had jurisdiction of the subject-matter. It is argued that since the court is in a sense the over-guardian, charged at all times with the duty of protecting

the property of infant wards, that it has jurisdiction of the guardian at all times, and that it may make such orders as may be necessary without the notice required by the statute, because of this inherent power. We think this reasoning is sound to the extent that the court may at all times summarily require the guardian to give such additional security as may be deemed necessary to protect the estate, but we doubt, in view of the authorities cited, whether it can be said to extend so far as to authorize the court to release sureties on a bond unless the jurisdiction of the court has been invoked in the manner provided by the statute.

It is expressly found by the court that no petition was filed by the sureties asking to be released, and that the order of release was made without any notice to the guardian. In the case of *American Bonding Co. v. Hall* (1915), 57 Ind. App. 523, 106 N. E. 534, recently decided by this court, a question quite similar in its facts was considered by this court. In that case it was held that the court below had no power to release sureties on a bond previously given, unless the action is taken pursuant to a statute, and in strict conformity therewith. All bonds given are treated as cumulative security, unless the statute providing the manner in which sureties may be released is strictly followed. The beneficiary is held to have a vested interest in said bond, and unless the release is in strict conformity to the statute, it remains in full force until its conditions are performed, or its penalty exhausted, or until barred by the statute of limitations. Applying the rule thus announced, we hold that the order of court in attempting to release the sureties without their application, and without notice to the guardian was void.

It is further argued that the release of Ziba F. Little, as surety on the original bond, as shown in the special finding, operated as a release of this appellant from the bond

3. being considered, upon the theory that they were co-sureties, and the release of one discharged all co-

Pittsburgh, etc., R. Co. v. Ervington—59 Ind. App. 371.

sureties. Appellant's contention would have much force if the parties had signed the same bond, but since they did not, the discharge of Little did not release appellant. 32 Cyc. 157; 2 Thornton & Blackledge, Administration and Settlement of Estates §360; *Tyner v. Hamilton* (1875), 51 Ind. 259. It follows that no error was committed by the trial court. Judgment affirmed.

NOTE.—Reported in 109 N. E. 431. As to personal liability of guardians, see 75 Am. Dec. 447. See, also, under (1) 21 Cyc. 48; (2, 3) 21 Cyc. 236.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST.
LOUIS RAILWAY COMPANY v. ERVINGTON,
ADMINISTRATRIX.

[No. 8,485. Filed March 10, 1915. Rehearing denied June 24, 1915.]

1. RAILROADS.—*Crossing Accidents.*—*Negligence.*—*Complaint.*—A complaint for death resulting from a railroad crossing accident, charging that defendant's servants negligently failed to ring the bell or blow the whistle as required by law on approaching such crossing, that such servants, knowing that the view of a traveler on the highway was completely obstructed by standing cars, negligently failed to give any warning of the approach of the train, and that, knowing the character of the crossing and its use by many people, they negligently failed to give any signal whatever of the approach of the train, and negligently ran the same at a high and dangerous rate of speed, etc., whereby plaintiff was killed, while evidencing an intent to charge three distinct acts of negligence, can not be said to proceed upon the theory that the death was caused by a combination of the acts of negligence alleged, and would be sufficient with no other averments of negligence save those relating to failure to give the statutory signals. pp. 374, 377.
2. NEGLIGENCE.—*Pleading.*—*Complaint.*—*Averment of Several Acts of Negligence.*—Several distinct acts of negligence may be charged in a single paragraph of complaint and a recovery on such complaint will be upheld if one of the acts of negligence charged has been sufficiently proved, unless the acts of negligence are so related as to show that the injury resulted from a combination of two or more of such acts. p. 376.
3. RAILROADS.—*Crossing Accidents.*—*Failure to Give Signals.*—*Complaint.*—*Ability to Hear Signals.*—In an action to recover

for death resulting from a railroad crossing accident, where the negligence charged is a failure to give the statutory signals of the approach of the train to the crossing, plaintiff need not allege that decedent was in a position to have heard the signals if they had been given. p. 377.

4. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Complaint.*—A complaint to recover for death in a railroad crossing accident, charging negligence in failing to signal the approach of the train as required by statute, in failing to give any warning of its approach, and in operating the train at an excessive speed, and from which it appears that as decedent approached the crossing his view was obstructed until the horse reached the main track, that within 100 feet of the crossing decedent stopped, looked and listened, and continued to look and listen until he was upon the main track, but that he could neither hear nor see the train until he was upon the main track, etc., is not objectionable as showing that decedent was guilty of contributory negligence. p. 377.
5. RAILROADS.—*Crossing Accidents.—Failure to Signal Approach of Train.—Private Crossing.—Dedication to Public Use.—Evidence.*—Where it was conceded in an action for the death of plaintiff's decedent in a crossing accident that the statutory signals were not given as the train approached the crossing, the evidence was not insufficient to sustain a verdict for plaintiff on the theory that the crossing was a private crossing to which the statutory provision for signalling does not apply, where there was evidence to show that the accident occurred near the corporate limits of a city, that though the crossing was originally constructed as a private crossing for the person then owning all the surrounding land, it was later planked and graded and approaches and a wing fence were made, and a gate removed, that the then owner of the land sold same to various grantees, reserving in each of the deeds thirty feet on each side of the center line of the traveled way leading to and over such crossing so that a street would be provided for, and that such street was improved in the usual manner and used indiscriminately by the public. pp. 378, 380.
6. HIGHWAYS.—*Establishment.—Dedication.*—Lands may be irrevocably dedicated to the public for highway purposes by the open conduct of the owner, if his visible acts are such as to indicate an intention to dedicate the lands for such purposes and the public has in good faith acted thereon and accepted the dedication. p. 379.
7. RAILROADS.—*Right of Way.—Dedication for Highway.—Crossing.*—In determining whether a part of a railroad right of way has been dedicated to the public for a highway the same principles are applied as in determining such question in the case

Pittsburgh, etc., R. Co. v. Ervington—59 Ind. App. 371.

of a private landowner, and where a railroad company by its conduct has indicated an intention to dedicate land to the public for a crossing, and others have in good faith acted upon the open evidence of such intention, any other secret intention will not prevail against the actual result of its own open conduct upon which the public has relied and acted accordingly. p. 379.

8. RAILROADS.—*Crossing Accidents.—Duty of Traveler.—Contributory Negligence.—Burden of Proof.*—A traveler approaching a railroad crossing over the highway is chargeable only with the exercise of ordinary care under all the circumstances, and the burden of proving his contributory negligence is upon the defendant. p. 380.

9. RAILROADS.—*Crossing Accidents.—Evidence.—Contributory Negligence.—Jury Question.*—In an action for death in a railroad crossing accident, where it was conceded that the statutory signals of the approach of the train were not given, and the evidence showed the condition of the crossing to be such that an approaching train could not be seen by decedent until he was upon the track, because of standing cars and a curve in the track, and that decedent stopped, looked and listened when 100 feet from the crossing, and, neither hearing nor seeing an approaching train, continued toward the crossing constantly looking and listening, etc., the court can not say as a matter of law that decedent necessarily saw or heard the approaching train in time to avoid the collision, but the question was for the jury and it was warranted in finding that decedent's death happened in the manner indicated and was the result of the negligent failure to give the statutory signals. pp. 380, 381.

10. RAILROADS.—*Crossing Accidents.—Evidence.—Manner of Traveler's Death.*—In an action to recover for death of a traveler at a railroad crossing, plaintiff need not show by eye witnesses just how the decedent met his death, but it is sufficient if the evidence taken as an entirety supports the theory of the complaint, and the hypothesis which it is adduced to prove, and it is for the jury to determine the reasonable probability of the truth of all the evidence presented. p. 381.

11. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Knowledge of Conditions.—Evidence.*—In an action for the death of a traveler at a railroad crossing, the fact that shortly before the accident decedent had passed over the crossing and knew something of the conditions surrounding it, would not of itself charge him conclusively with contributory negligence in attempting to cross later, but the question would necessarily depend on all the facts and circumstances surrounding the crossing and the amount of care exercised by him, and in view of a failure of the evidence to show that the crossing was so dangerous that

Pittsburgh, etc., R. Co. v. Ervington—59 Ind. App. 371.

a man of ordinary prudence might have reasonably supposed that in the exercise of ordinary care on his part, and the giving of proper signals on defendant's part, he could cross in safety, the jury's finding that he was not guilty of contributory negligence can not be disturbed on the ground that the evidence is insufficient. p. 381.

12. RAILROADS. — *Crossing Accidents. — Character of Crossing. — Evidence.*—In an action for death in a railroad crossing accident, grounded on a negligent failure to give the statutory signals of the train's approach, communications in the nature of self-serving declarations or secret instructions between defendant and its section foreman relative to the character of the crossing, to show that it was a private crossing, were properly excluded, since such communications could not affect the legitimate conclusions properly to be deduced from the open conduct of defendant. p. 382.

From Cass Circuit Court; *John S. Lairy*, Judge.

Action by Daisy Ervington, Administratrix of the Estate of Walter Ervington, deceased, against The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George E. Ross and *John L. Rupe*, for appellant.

Blackledge, Wolf & Barnes and *McConnell, Jenkines, Jenkines & Stuart*, for appellee.

IBACH, J.—Appellee brought this action for the negligent killing of her decedent at a public highway crossing near Kokomo, Indiana. The cause was tried on the first paragraph of the complaint. The trial was by jury and a verdict for appellee for \$5,000 was returned. Over motion for new trial, judgment was rendered on the general verdict. The errors assigned bring in question the overruling of the demurrer to the complaint, and overruling the motion for new trial.

The complaint first avers facts to show the dangerous character of the crossing, and that it was a public crossing, with the allegations respecting the negligence of appellant:

1. "That the defendant's servants and employes negligently and carelessly failed and neglected to ring the

bell or blow the whistle on the locomotive of said train as required by law upon approaching said Plate Street, at the places required by law for signals to be given, to wit: not less than eighty nor more than one hundred rods east and south-east of said crossing. That the defendant's said servants and employes upon said train, at the time, well knew that the view of any traveler coming from the south, approaching said crossing, was obstructed by the cars setting on said side track and that it would be impossible for any traveler to see the approach of a train until he had passed the said line of cars and was upon the main track, so that he could not see any train approaching from the east until he had reached that point. That notwithstanding the said knowledge upon the part of the said servants and employes, they negligently and carelessly failed and neglected to give any warning of the approach of said train as it approached said Plate Street, and did not blow the whistle or ring the bell or give any other signal of the approach of said train at any point to the east, although they well knew that the said view was obstructed, as aforesaid. That the said servants and employes knew at that time, that the said crossing was a public crossing and was used by the public in passing back and forth, and that it was a place where were many dwelling houses, and a large number of the public were passing and repassing. Notwithstanding these facts and this knowledge on the part of the said employes, they negligently and carelessly failed to give any signal whatever of the approach of said train, and carelessly and negligently ran said locomotive and cars at a high and dangerous rate of speed, to wit: fifty miles per hour, toward, upon and over said Plate Street. That the plaintiff's decedent could not hear the approach of the train as he approached in his buggy, and no signal was given warning him of the approach of said train. That he cautiously and carefully drove his horse upon the said crossing, and the said train, from the east, came into collision with his said buggy and threw him a long distance to the north-

west, along the side of the track, and killed the said plaintiff's decedent. That the death of the said plaintiff's decedent was caused by the said negligence and carelessness of the defendant, its servants and employes, as above alleged. That the defendant's negligence and carelessness in failing to sound a whistle, or give any other signal, not less than eighty nor more than one hundred rods east of the said crossing, or to give any other signal, after that time, upon the approach of said train to said crossing, in time to warn the plaintiff's decedent, and also the negligence and carelessness of the defendant in allowing its cars to stand on the side track as above alleged, that they so obscured the view and made it impossible for plaintiff's decedent to see the train approaching, and the negligence and carelessness of the defendant's servants in running the said train at said high and dangerous speed upon and against the plaintiff's decedent, was the direct and proximate cause of the death of said plaintiff's decedent. That the defendant's employes and servants did, negligently and carelessly, run and operate the said train to and against the plaintiff's decedent, as above alleged, and thereby caused his death, solely and wholly by reason of the aforesaid negligent and careless acts of the defendant's employes and servants." It is evident that the pleader has intended to charge three distinct acts of negligence, but we do not believe it is fair to say that although the complaint avers three separate acts of negligence, that it proceeds upon the theory that decedent's death was caused by a combination of all such negligent acts alleged. It is not improper to charge several dis-

2. tinct acts or grounds of negligence in the same paragraph of complaint, and a recovery on such complaint will be upheld if one or more grounds of negligence have been sufficiently proven, unless the grounds of negligence charged are so related one to the other as to show that the injury complained of was the result of two or more of the negligent acts charged, combined. *Lake Erie, etc., R. Co. v. Beals* (1912), 50 Ind. App. 450, 98 N. E. 453, and cases cited. This

Pittsburgh, etc., R. Co. v. Errington—59 Ind. App. 371.

court in discussing a similar question said: "But in

1. the case at bar the averments of negligence concerning the pool of slag might be omitted from the complaint and there would still remain a cause of action." *Gould Steel Co. v. Richards* (1903), 30 Ind. App. 348, 353, 66 N. E. 68. So in the case at bar all the averments of negligent acts might be omitted from the complaint save those relating to a failure to give the statutory signals, and that decedent's death resulted from such failure, and the complaint would be sufficient. *Baltimore, etc., R. Co. v. Musgrave* (1900), 24 Ind. App. 295, 297, 55 N. E. 496, and cases cited; *Fort Wayne, etc., Traction Co. v. Crosbie* (1907), 169 Ind. 281, 287, 81 N. E. 474, 13 L. R. A. (N. S.) 1214, 14 Ann. Cas. 117, and cases cited.

Appellant contends also that the complaint is bad without an averment that the decedent was in a position to have heard the signals if they had been given. Such aver-

3. ments are not necessary. *Pittsburgh, etc., R. Co. v. Terrell* (1912), 177 Ind. 447, 95 N. E. 1109, 42 L. R. A. (N. S.) 367. Neither are we satisfied that the com-

4. plaint affirmatively shows decedent guilty of contributory negligence. The complaint avers that as decedent approached the crossing from the south the view of an approaching train from the east was obstructed until the horse which he was driving reached the main track, that within 100 feet of the crossing he stopped, looked and listened for an approaching train, and he continued so to look and listen until he came upon the main track, but could not see or hear a train approaching, that at all times he continuously looked and listened until he passed the obstruction and was in fact on the main track, and that the approaching train could not be seen until he reached that point. These averments with others contained in the pleading show decedent free from contributory negligence. There was no error in overruling the demurrer to the complaint. *New York, etc., R. Co. v. Robbins* (1906), 38 Ind. App. 172, 76 N. E. 804;

Pittsburgh, etc., *R. Co. v. Ervington*—59 Ind. App. 371.

Ohio, etc., R. Co. v. McDonald (1892), 5 Ind. App. 108, 31 N. E. 836; *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 88 N. E. 612; *Rosenthal v. Chicago, etc., R. Co.* (1912), 255 Ill. 552, 99 N. E. 672.

Under the motion for a new trial it is argued that the verdict of the jury is not sustained by sufficient evidence.

Under this assignment, in view of what we have said

5. with reference to the sufficiency of the complaint, together with the position taken by both parties in their briefs and in the oral argument, the principal ground of negligence we need to consider further is that which charges negligence in failing to give the statutory signals required to be given before crossing over a public crossing. The accident occurred at a crossing outside of, but near the corporate limits of Kokomo. It is conceded that the statutory signals were not given, but it is urged that the crossing in question was a private crossing and not a public crossing, therefore no signals were required. The evidence shows that many years prior to the unfortunate accident, all the land in that immediate vicinity was owned by William Tate, and for his convenience an arrangement was made with appellant for a private crossing and its maintenance. There is some evidence tending to show that this crossing for some years was planked only a part of the time, but later the crossing was completely planked, was graded, and was filled in with gravel and cinders across both the main track and switch track, approaches were constructed on both sides of the crossing, wing fences were also constructed, and a wire gate located on the south side of the right of way was removed, the wing fences were painted white. It was also shown that in 1900 William Tate sold certain tracts of his land along the traveled roadway, and provided in all the deeds for a reservation thirty feet in width on each side of the center line of said traveled way, so that a street sixty feet in width would be provided for, and for some distance both to the north and south of the railroad this way was improved as the streets in

suburbs to cities such as Kokomo are usually improved. The evidence also shows that this way was used indiscriminately by the public desiring to use it, so that it seems to us there is ample evidence from which the jury might properly find that there was a public street both to the north and south of the railroad crossing, in width sixty feet, in all essential respects the same as if it was in fact a legally established highway. As to the width of the railroad right of way at the point where it was crossed by such street, the evidence shows that such crossing was planked and wing fences were constructed by appellant, all of which facts were proper for the consideration of the jury in determining whether appellant had dedicated a public crossing at that point.

Dedication of lands for highway purposes has been accomplished in many ways, one of which is by the open conduct of the landowner, and if the visible acts of the

6. landowner are such as to indicate an intention to dedicate lands for highway purposes, and the public has in good faith acted upon such apparent dedication, and has accepted it, the law will treat such acts of the owner as constituting an irrevocable dedication. *Gillespie v. Duling* (1908), 41 Ind. App. 217, 222, 83 N. E. 728; *Stewart v. Swartz* (1914), 57 Ind. App. 249, 106 N. E. 719; *Cleveland, etc., R. Co. v. Christie* (1912), 178 Ind. 691, 100 N. E. 299.

In determining whether a part of a railroad right of

7. way has been dedicated as a public highway the same principles are applied. *Cleveland, etc., R. Co. v. Christie, supra*; *Pittsburgh, etc., R. Co. v. Town of Crown Point* (1898), 150 Ind. 536, 57 N. E. 41; *Evansville, etc., R. Co. v. State, ex rel.* (1898), 149 Ind. 276, 49 N. E. 2. It has also been held repeatedly that when a railroad company by its conduct has indicated to the public an intention to dedicate land to the public for a crossing and others have in good faith acted upon the open evidence of such intention, any other secret intention will not prevail against the actual result of its own open conduct upon which the public has

Pittsburgh, etc., R. Co. v. Ervington—59 Ind. App. 371.

relied and acted accordingly. *Lake Erie, etc., R. Co. v. Town of Boswell* (1894), 137 Ind. 336, 343, 36 N. E. 1103; *Michigan Cent. R. Co. v. Hammond, etc., R. Co.* (1908), 42 Ind. App. 66, 76, 83 N. E. 650, and cases cited; *St. Paul, etc., R. Co. v. City of Minneapolis* (1890), 44 Minn. 149, 46 N. W. 324; *Missouri Pac. R. Co. v. Lee* (1888), 70 Tex. 496, 7 S. W. 857, 858.

Summarizing, it may be said that there was dedicated to the public a sixty-foot street to the north of the railroad, and to the south a distance of at least 150 feet from

5. the railroad, and it seems to us that the acts of appellant may be taken as showing an intention to form a continuation over its right of way and tracks of the street dedicated by the property owners so as to connect with that portion of a street dedicated by the property owners south of the right of way. The jury at least had the right to draw that conclusion from all of the evidence as to what was done by all the parties with reference to the dedication of the street, and from the appearances produced by the appellant, that it was intended by all parties to make the crossing in question a public crossing and therefore at the time of decedent's death it was incumbent on appellant to give the statutory signals when its trains were approaching the same. §5431 Burns 1914, §4020 R. S. 1881.

The burden of proving contributory negligence was on appellant, and the decedent was chargeable only with the exercise of ordinary care under all circumstances,

8. and it was for the jury to say whether or not he so acted under all the circumstances shown by the evidence. Without mentioning many other conditions

9. existing at the time of the accident, but taking into consideration the manner in which decedent approached the crossing the curve in the tracks near the crossing, around which the train was approaching at a rate of speed from twenty-five to thirty miles an hour, the other obstructions between him and the train, the appearance of

Pittsburgh, etc., R. Co. v. Ervington—59 Ind. App. 371.

the crossing which the jury might conclude was such as to indicate to decedent that the signal of an approaching train would be sounded before reaching the crossing, we can not say as a matter of law that decedent necessarily saw or heard the train approaching in time to avoid the collision. On the other hand, we are convinced that the evidence fully justified the jury in finding that the accident happened in the manner so indicated; and that the failure to give the statutory signals was the primary cause of the injuries inflicted upon decedent. It was not necessary for

10. plaintiff to show by any witness who actually saw the collision, just how decedent met his death. In such a case it is sufficient if the evidence taken as an entirety supports the theory of the complaint, and the hypothesis which it is adduced to prove, and it is for the jury to determine the reasonable probability of the truth of all the evidence presented. There is no direct

9. evidence as to the exact manner in which decedent met his death, but there are many circumstances developed by the evidence from which it may be fairly inferred that decedent approached the crossing carefully, looked and listened for approaching trains, advanced carefully until he emerged from the obstructions which prevented his seeing the train until he was on the track on which the train was approaching, and until it was too late for him to entirely clear the crossing before the train passed over, also that there were other conditions and circumstances which prevented him from hearing any noise the train produced. There is nothing in the proven facts which even tended to indicate that decedent failed to exercise due care when approaching the crossing, of the character of which he had some knowledge, or in attempting to drive over. The

11. fact that he had a short time before the accident crossed over the crossing and knew something of the conditions surrounding it, would not in itself charge him conclusively with contributory negligence in attempting to

cross later. This would necessarily depend on all the facts and circumstances surrounding the crossing and the amount of care exercised by him at that time. It does not appear that the crossing was in so dangerous a condition but that a man of ordinary prudence, might have reasonably supposed that in the exercise of ordinary care on his part, and the giving of the proper signal on appellant's part, he could cross over in safety. *Baltimore, etc., R. Co. v. Rosborough* (1907), 40 Ind. App. 14, 80 N. E. 869; *Pittsburgh, etc., R. Co. v. Cottman* (1913), 52 Ind. App. 661, 101 N. E. 22; *Pittsburgh, etc., R. Co. v. Macy* (1915), 59 Ind. App. 125, 107 N. E. 486.

It is conceded that no crossing signals were given, and while the absence of the signals would not excuse the decedent from the exercise of ordinary care in his attempt to cross over the tracks, the jury had the right to take that fact into consideration to decide whether he was in the exercise of due care at the time, so that as the evidence in the case fails to show that decedent could have discovered the train had he looked and listened, a sufficient length of time before the collision, to have avoided it, the question of his contributory negligence was properly left to the jury. This particular question has been many times discussed by our courts, and each has consistently held that when the sufficiency of the evidence on the subject of contributory negligence is raised and there is a conflict in the evidence on that point, that question must be submitted to the jury and its finding will not be disturbed. See cases cited, *supra*.

There was no error in excluding from the evidence communications between appellant and the section foreman relative to the character of the crossing. These were

12. at best only self-serving declarations, or secret instructions, and understandings between them which would have no effect on the legitimate conclusions properly to be deduced from the open conduct of appellant.

We have not overlooked the assignments of error relating

Cleveland, etc., *R. Co. v. Means*—59 Ind. App. 383.

to the instructions given and refused, but we think they are not material. The jury was very fully and guardedly instructed as to the rules of law applicable to the case, and generally as to the purposes for which the evidence was admitted. We conclude therefore, that the case was fairly presented to the jury, and sufficient evidence appears to sustain the verdict. Judgment affirmed.

NOTE.—Reported in 108 N. E. 133. As to duty of traveler on highway to use senses of sight, hearing, etc., to avoid danger at railroad crossings, see 90 Am. Dec. 780. As to the sufficiency of general allegations of negligence, see 59 L. R. A. 210. On the question of statutory signals as measure of duty at railroad crossing, see 15 L. R. A. 426. For the failure to give signals as excusing non-performance of duty to look and listen, see 3 L. R. A. (N. S.) 391. As to the presumption of dedication from user as highway, see Ann. Cas. 1914 D 335. As to the failure of a railroad company to give statutory signals on approaching crossing as excuse for traveler's contributory negligence, see 6 Ann. Cas. 78. As to burden of proof as to contributory negligence, see 10 Ann. Cas. 4. See, also, under (1) 33 Cyc. 1053; (2) 29 Cyc. 565; (3) 33 Cyc. 1058; (4) 33 Cyc. 1060; (5) 33 Cyc. 1090; (6) 13 Cyc. 453; (7) 13 Cyc. 449, 452; (8) 33 Cyc. 981, 1070; (9) 33 Cyc. 1111, 1107; (10) 33 Cyc. 1087; (11) 33 Cyc. 1093; (12) 33 Cyc. 1079.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *v.* MEANS.

[No. 8,086. Filed April 2, 1914. Rehearing denied April 2, 1915.
Transfer denied June 24, 1915.]

1. *APPEAL.—Ruling on Demurrer.—Briefs.—Sufficiency.*—Appellant's brief containing the substance of the complaint and the statement that "appellant demurred to the appellee's complaint on the ground that the same did not state facts sufficient to constitute a cause of action", followed by a citation of the page and lines of the record where the demurrer is to be found, together with the statement that "the demurrer to the complaint was overruled and appellant excepted to the ruling", and a citation of the page and lines where such ruling is to be found, substantially complies with the requirements of Rule 22, so as to present for

review the questions raised by the assignment of error in the overruling of such demurrer. p. 387.

2. RAILROADS.—*Injuries to Children on Tracks.—Constructive Notice.—Duty of Railroad Company.*—Where a railroad switch was maintained near a public park in a densely populated part of a city to which children from the park and immediate vicinity were attracted by wheat which had leaked from cars, and such condition had existed for several years and was known, or by the use of reasonable diligence could have been known to the company, it owed to a five-year-old boy, attracted there by other boys gathering wheat, the duty to exercise ordinary care before moving cars standing on such switch, regardless of whether he was a trespasser, or a licensee by permission or invitation, or whether the case was within either the last clear chance or attractive nuisance doctrine, since the company had at least constructive knowledge of his presence in a situation of peril from which he was unable by reason of his infancy to extricate himself. pp. 387, 395, 399, 408.
3. NEGLIGENCE.—*Duty Toward Trespassers.*—The owner or occupant of premises, as a general rule, owes no duty to a trespasser thereon, except to refrain from wilfully or intentionally injuring him after discovery of his presence. p. 391.
4. NEGLIGENCE.—*Injury to Licensee.—Licensee by Permission.*—A licensee who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, enters at his own risk and enjoys the license subject to its concomitant perils. p. 392.
5. NEGLIGENCE.—*Injury to Licensee.—Licensee by Invitation.—Duty of Owner or Occupant of Premises.*—The owner or occupant of premises owes to a licensee thereon by invitation the duty of making and keeping such premises in a reasonably safe condition, suitable for the use of such licensee while he remains thereon under such invitation, for a breach of which he is liable for resulting injury to such licensee, if the latter is free from contributory negligence. p. 393.
6. NEGLIGENCE.—*Injury to Licensee.—Liability.—Licensee by Permission.*—The owner of premises is not liable to a licensee by permission for injuries from mere passive negligence or owing to defects in the condition of the premises, since such a licensee, being one who for his own convenience, curiosity or entertainment goes upon the premises by permission or sufferance of the owner, is held to take the premises as he finds them. p. 393.
7. RAILROADS.—*Licensees.*—Licensees of a railroad company are persons who, being neither passengers, servants or trespassers, nor persons in any contractual relation to the company, are permitted to be upon its premises for their own interests, convenience or gratification. p. 393.

8. NEGLIGENCE.—*Licensee by Invitation*.—A licensee by invitation is one who goes upon the land of another with the express or implied invitation of the owner or occupant, either to transact business with the owner or occupant, or to do some act which is of advantage to such owner or occupant, or of mutual advantage to both the licensee and the owner or occupant. p. 394.
9. NEGLIGENCE.—*Licensees.—Invitation.—Failure to Object*.—Mere acquiescence, or failure to object, is not in itself sufficient to sustain an inference that a licensee upon the premises of another was a licensee by invitation. p. 394.
10. NEGLIGENCE.—*Liability for Injuries to Licensee or Trespasser*.—Notwithstanding general rules, there are exceptional cases, though not subject to classification under either the last clear chance or attractive nuisance doctrine, wherein liability arises against the owner or occupant of premises for injuries to a child going thereon, whether as a trespasser or as a licensee by permission or invitation, from the fact of the presence of such child in a situation of peril and the knowledge of the owner or occupant, actual or constructive, of such child's presence in a perilous and helpless situation, and the resultant duty in view of such knowledge to use care. p. 398.
11. NEGLIGENCE.—*Questions of Law or Fact*.—Whether a party sought to be charged with liability for negligence owed any duty to observe care toward the person injured is a question of law for the court, while the question of whether such duty was properly performed is a question of fact for the jury. p. 402.
12. RAILROADS.—*Children on Tracks.—Duty of Railroad Company*.—A railroad company owes no duty to keep a lookout for the presence of a child upon its tracks, but after knowledge of its presence, either actual or constructive, the company owes the duty of ordinary care to avoid injuring it. p. 402.
13. RAILROADS.—*Children on Tracks.—Duty of Railroad Company*.—A railroad company can not assume that a licensee of immature years will look after his own safety and will not place himself in a situation of peril while upon its premises, and constructive knowledge that children of tender age are on its tracks, or probably will be on its tracks at a particular place, carries knowledge of their peril or probable peril and helpless condition, so that in such case the vigilance or care required may become affirmative in character and call for the exercise for the child of the care and vigilance which the company must know that the child can not exercise for itself. (*Cannon v. Cleveland, etc., R. Co.* [1901], 157 Ind. 682, criticised.) p. 405.
14. RAILROADS.—*Children on Tracks.—Duty of Railroad Company*.—A railroad company is not an insurer of the safety of children

Cleveland, etc., R. Co. v. Means—59 Ind. App. 383.

who come upon its premises; nor does it at all times and all places owe them the duty of any care, but its duty is simply that which attaches to every member of society undertaking to exercise a personal right in a manner which may affect the welfare or safety of another member, which is the obligation to use reasonable care; and such reasonable care does not impose any duty where the presence of a child on its tracks is merely possible, or where the exercise of such care would impose on the company an unreasonable limitation on the usual and ordinary use of its property. p. 407.

15. RAILROADS.—*Injuries to Children on Tracks.—Jury Questions.*

—Where a railroad company was charged with constructive knowledge of the presence of children on its switch track and there was evidence to show that before moving one of its cars standing thereon, no signal or warning of any kind was given, the question of whether it exercised the degree of care that an ordinarily prudent person would have exercised, and whether the lack of such care was the proximate cause of the death of one of the children, were questions of fact for the jury. p. 411.

16. RAILROADS.—*Injuries to Children on Tracks.—Contributory Negligence.—Jury Question.*

—The questions of whether a mother was negligent in permitting her five-year-old child to go to a public park near a railroad switch track in the care of his twelve-year-old brother, and whether the brother was negligent in going upon the switch track, were for the jury, in view of evidence to support the averments of the complaint as to such questions. p. 411.

17. APPEAL.—*Review.—Evidence.—Sufficiency.*—In determining the sufficiency of the evidence to sustain the verdict, the court on appeal is required to look only to that evidence most favorable to appellee p. 412.

18. APPEAL.—*Review.—Verdict.—Conclusiveness.*—A general verdict supported by some evidence is conclusive on the question of the sufficiency of the evidence. p. 415.

From Superior Court of Marion County (82,554); *Willard New*, Judge *Pro Tem*.

Action by Hannah Means against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Frank L. Littleton, Leonard J. Hackney and Charles P. Stewart, for appellant.

Emrick & Deupree and B. F. Watson, for appellee.

HOTTEL, J.—This was a suit by appellee to recover damages for the death of her infant son, alleged to have been caused by appellant's negligence. A complaint and an answer of general denial presented the issues of fact. A trial by jury resulted in a verdict for appellee for \$400. A demurrer to the complaint, a motion for a peremptory instruction, and a motion for a new trial were each overruled and these several rulings are each separately assigned as error, and relied on for reversal.

Appellee insists that appellant has waived the error, if any, resulting from the ruling on the demurrer to the complaint because of its failure to set it out in its brief.

1. The brief states that "appellant demurred to the appellee's complaint on the ground that the same did not state facts sufficient to constitute a cause of action", and follows with a citation of the page and lines of the record where such demurrer will be found. It then states that "the demurrer to the complaint was overruled and appellant excepted to the ruling", and cites the page and lines of the record where such ruling will be found. This is a substantial compliance with Rule 22 of the Supreme Court and this court. The substance of the complaint, the ground of the demurrer thereto, and the ruling thereon, all being disclosed by the brief, the court has clearly before it the question which it is called on to determine, without reference to the record, and this is all that said rule, or any construction placed thereon by the Supreme Court or this court, contemplates.

The other rulings complained of present one and the same question. The complaint follows, as far as applicable, the complaint in the case of *Indianapolis Water Co. v.*

2. *Harold* (1908), 170 Ind. 170, 83 N. E. 993, and is, we think, sufficient. In any event, it avers in terms favorable to appellee and her recovery, all the essential facts disclosed by the evidence, and the most serious question presented by the appeal is that of the sufficiency of the evi-

dence to sustain the verdict. We therefore go direct to this question. The facts disclosed both by the complaint and the evidence about which there is little or no dispute, are in substance as follows: The appellant is a corporation organized under the laws of the State of Indiana, and owns and operates railroad lines therein. On August 10, 1910, and for a long time prior thereto, it owned and operated several of its lines of railroad in and through the city of Indianapolis, and owned and maintained switches in connection therewith, at all times, herein mentioned. One of the switches extended from a track laid in North Missouri Street in said city, formerly known as the main line of the Chicago division of defendant's railroad system, thence in a westerly direction on the south embankment of the canal of the Indianapolis Water Company to the manufacturing establishment of Love Brothers. Said switch track crossed West Street and Blackford Street, in said city. On said date, and for a long time prior thereto, the city maintained a public park, called Military Park immediately north of said canal, the park being bounded on the west by Blackford Street, on the east by West Street and on the north by New York Street. The park is situated in a densely populated part of the city and was at that time, and for years prior thereto had been attractive to the children in the immediate vicinity of the park as a playground, and during the summer and autumn months children congregated in great numbers in the park and the vicinity thereof to play. The southwest corner of the park was within seventy-five feet of the above described railroad track, or switch, at the point where the same crossed Blackford Street. On the afternoon of August 10, 1910, appellant had ten cars coupled together standing on the switch, one of which cars was within thirty feet of Blackford Street. Some of the cars were so placed for the use and benefit of the Acme-Myers Milling Company, located at the corner of the railroad track and Blackford Street. At the time herein referred to a

number of said cars had been unloaded by the milling company, but quantities of wheat still remained in all of the cars and some of them were yet loaded with wheat. Wheat had leaked from the cars to the ground around and under the cars and near and on the track where the cars were standing. This condition, with the exception of the number of cars standing on the track, had existed for several years, and on August 10, 1910, and during all of said time prior thereto the wheat, on the track and in the unloaded cars, attracted and had attracted children from the park and its immediate vicinity, who played about the cars and track and collected and gathered up the waste wheat from the empty cars and from appellant's ground and tracks. In gathering the wheat, said children, at times, would be under and between the cars where a sudden movement of them would expose them to great danger. Appellant, on August 10, 1910, and for sometime prior thereto knew or by the use of reasonable diligence could have known of said facts. On the afternoon of said day, appellee's son, Joseph Minnehan, deceased, who was five years of age and living with appellee then a short distance from the park, was permitted by her to go to the park with an older brother twelve years of age. After the boys reached the park they with other boys were attracted and induced to leave the park and go upon the railroad track by seeing other children playing about the cars and gathering wheat thereunder. These boys, including decedent, proceeded to play and pick up and collect wheat under the cars to which there was at that time no engine attached. While the boys were so playing and gathering wheat from beneath and in said cars, and while said Joseph Minnehan was standing between the first and second cars from Blackford Street and about eighty feet from the street watching the other boys gathering wheat, at 2:30 p.m. on said day, appellant, in attempting to couple thereon, negligently and carelessly caused an engine pushing six cars to run against the ten cars standing

on said track, and the impact caused the ten cars to move westward and thereby knocked decedent down on the rail of the track and further caused the second car to pass over him, amputating both his legs and one arm from which injuries he died. Appellant, before causing the cars to be moved, carelessly and negligently failed and neglected to give decedent or any of the boys any warning of any kind of their danger, although appellant knew that the condition of the cars placed upon the track, and the other heretofore described conditions, had induced and attracted boys to be at the place for several years prior to that day, and knew that children were gathering wheat and playing under and near the cars at the time, or by the use of reasonable diligence could have learned of the condition and facts and the danger to said Joseph Minnehan, by reason thereof. Appellee did not know of the existence of the conditions heretofore described, or that decedent, on account thereof, had been attracted from the park, but believed during all the time, from the time she gave her consent for her said son to go to the park to play until she was notified of his said injuries that he was at the park. The day on which decedent was injured was unusually warm and the conditions aforesaid were naturally inclined to attract a child, and being without warning of danger, and of immature judgment, he was thereby attracted to his death. On account of his tender years said child was *non sui juris*, and incapable of appreciating the danger there was in being between the cars. Appellant caused the six cars to be pushed by the engine into said ten cars, knowing when it did so, that children were likely to be playing and gathering wheat at the place where the ten cars were standing, and without making any effort to discover whether children were playing and gathering wheat and without giving such children any notice or warning of the approach of such engine and cars.

Are these facts sufficient to show a liability on the part of appellant for the injury resulting in the death of appel-

lee's child? Appellant answers, no, and files a brief in support of such answer in which it cites numerous authorities, many of which give apparent support to its contention. Appellee makes an affirmative answer and furnishes a brief also well supported by authority. Our own investigation of the question convinces us that either party might have added materially to the number of authorities cited in support of the respective contentions. There is in these cases a great divergence of opinion and apparent conflict. However, it should be said, in this connection, that such apparent conflict, generally speaking, does not result from any different announcement of general principles ordinarily applicable and controlling in such cases, but, from the application made of such principles to the facts of the particular case, and in some instances, from the reasons given for applying or refusing to apply the particular general rule to the particular case, or the reason given for placing such cases within some exception to such general rule or rules.

Appellant seeks to relieve itself from liability on the ground that appellee's decedent, when injured, was on its premises as a trespasser, or, at most, as a licensee by sufferance, permission or passive acquiescence only. Speaking generally, it is no doubt true, as appellant, in effect contends that the duty of the owner or occupant of premises to a person injured thereon, depends largely on whether such person was there as a trespasser, or as licensee by permission or passive acquiescence only or as a licensee by the inducement or invitation express or implied of such owner or occupant. The duty of the owner of the premises toward a person injured thereon as affected by such respective relations between him and such owner, has been frequently recognized by the courts of this State and other jurisdictions to be, in general terms as follows: The owner

3. or occupant of premises owes no duty to the trespasser thereon, except to refrain from wilfully or intentionally injuring him after discovery of his presence.

 Cleveland, etc., R. Co. v. Means—59 Ind. App. 383.

Cannon v. Cleveland, etc., R. Co. (1902), 157 Ind. 682, 688, 62 N. E. 8; *Lingenfelter v. Baltimore, etc., R. Co.* (1900), 154 Ind. 49, 52, 55 N. E. 1021; *Faris v. Hoberg* (1893), 134 Ind. 269, 276, 33 N. E. 1028, 39 Am. St. 261; *Manlove v. Cleveland, etc., R. Co.* (1902), 29 Ind. App. 694, 700, 65 N. E. 212; *Chicago, etc., R. Co. v. Martin* (1903), 31 Ind. App. 308, 318, 65 N. E. 591; *South Bend Iron Works v. Larger* (1894), 11 Ind. App. 367, 370, 39 N. E. 209; *Dull v. Cleveland, etc., R. Co.* (1899), 21 Ind. App. 571, 594, 52 N. E. 1013, and cases cited; *Terre Haute, etc., R. Co. v. Graham* (1884), 95 Ind. 286, 48 Am. Rep. 719; *Parker v. Pennsylvania Co.* (1893), 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; *Pennsylvania Co. v. Meyers* (1894), 136 Ind. 242, 36 N. E. 32; *Ivens v. Cincinnati, etc., R. Co.* (1885), 103 Ind. 27, 2 N. E. 134; *Cleveland, etc., R. Co. v. Stephenson* (1894), 139 Ind. 641, 37 N. E. 720; *Redigan v. Boston, etc., R. Co.* (1891), 155 Mass. 44, 28 N. E. 1133, 31 Am. St. 520, 14 L. R. A. 276; *Martin v. Chicago, etc., R. Co.* (1902), 194 Ill. 138, 62 N. E. 599; *Lucas v. Richmond, etc., R. Co.* (1889), 40 Fed. 566; *Cleveland, etc., R. Co. v. Tartt* (1894), 64 Fed. 823, 12 C. C. A. 618; *Weldon v. Philadelphia, etc., R. Co.* (1899), 2 Pen. (Del.) 1, 43 Atl. 156; *Spicer v. Chesapeake, etc., R. Co.* (1890), 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385; *June v. Boston, etc., R. Co.* (1891), 153 Mass. 79, 26 N. E. 239; *Wright v. Boston, etc., R. Co.* (1886), 142 Mass.

296, 7 N. E. 866. "A licensee, who enters on prem-

4. ises by permission only, without any enticement, allure-
 ment or inducement being held out to him by the
 owner or occupant * * * goes there at his own risk, and
 enjoys the license subject to its concomitant perils." *Sweeny v. Old Colony, etc., R. Co.* (1865), 92 Mass. 368,
 87 Am. Dec. 644. See also, *Lary v. Cleveland, etc., R. Co.*
 (1881), 78 Ind. 323, 326, 328, 41 Am. Rep. 572, and cases
 cited; *Carleton v. Franconia Iron, etc., Co.* (1868), 99 Mass.

Cleveland, etc., R. Co. v. Means—59 Ind. App. 383.

216; *Harris v. Stevens* (1858), 31 Vt. 79, 90, 73 Am. Dec. 337; *Wood v. Leadbitter* (1845), 13 M. & W. *838.

To a licensee on his premises, *by invitation*, the master or occupant assumes an obligation of making and keeping such premises in a reasonably safe condition, suitable

5. for the use of such licensee while he remains thereon, under such invitation, and for a breach of this obligation he is liable in damages to a person injured thereby, who is himself free from contributory negligence. *Sweeny v. Old Colony, etc., R. Co., supra*; *Nave v. Flack* (1883), 90 Ind. 205, 207, 46 Am. Rep. 205; *Hawkins v. Johnson* (1886), 105 Ind. 29, 34, 4 N. E. 172, 55 Am. Rep. 169; *Indiana, etc., R. Co. v. Barnhart* (1888), 115 Ind. 399, 408, 16 N. E. 121, and cases cited; *Evans v. Adams Express Co.* (1890), 122 Ind. 362, 23 N. E. 1039, 7 L. R. A. 678.

In this connection it is important to know what persons are, in legal contemplation, licensees by permission only, and what persons are licensees by inducement or in-

6. vitation express or implied. On this subject the courts of different jurisdictions have expressed themselves as follows: A licensee by permission is one who, for his own convenience, curiosity or entertainment, goes upon the premises of another by his (the owner or occupant's) permission or sufferance. Such a person takes the premises as he finds them as to any defects therein, and the owner is not liable for any injuries resulting to him owing to defects in the conditions of the premises. He is not liable for *passive* negligence. *Lingenfelter v. Baltimore, etc., R. Co., supra*; *Lary v. Cleveland, etc., R. Co., supra*; *Evansville, etc., R. Co. v. Griffin* (1885), 100 Ind. 221, 223, 50 Am. Rep. 783; *Indermaur v. Dames*, 1 C. C. P. (Law Reports, 1865) 280. Licensees of a railroad company

7. have been defined to be those persons who, being "neither passengers, servants, nor trespassers, and not standing in any contractual relations to the railway,

are permitted by the railway to come upon its premises for their own interests, convenience or gratification". Patterson, Railway Accident Law §184. See, also, *Woolwine v. Chesapeake, etc., R. Co.* (1892), 36 W. Va. 329, 15 S. E. 81, 32 Am. St. 859, 860, 869, 16 L. R. A. 271. A licensee by

invitation is a person who goes upon the lands of an-

8. other with the express or implied invitation of the owner or occupant, either to transact business with such owner, or occupant, or to do some act which is of advantage to him (the owner or occupant) or of mutual advantage to both licensee and the owner or occupant of the premises. An invitation is implied from such a mutual interest. The distinction recognized by the authorities generally appears to be that a license by "invitation is inferred where there is common interest or mutual advantage, while a license (by permission) is inferred when the object is the mere pleasure or benefit of the person using it." Campbell, Negligence §§32, 33. See, also, Black, Law & Pr. in Accident Cases §13; *Pomponio v. New York, etc., R. Co.* (1895), 66 Conn. 528, 537, 34 Atl. 491, 50 Am. St. 124, 32

L. R. A. 530. "The law will not infer that the in-

9. jured party was induced to enter, except the facts are sufficient to show an express or implied invitation. Mere acquiescence, or failure to object, is not sufficient to sustain such an inference." *Morrow v. Sweeney* (1894), 10 Ind. App. 626, 634, 38 N. E. 187. The distinction above indicated between the duty which the owner or occupant of premises owes to a licensee by permission and a licensee by invitation in respect to keeping such premises safe for their use is recognized and discussed in the following cases, among many others: *Plummer v. Dill* (1892), 156 Mass. 426, 427, 31 N. E. 128, 32 Am. St. 463; *Nicholson v. Erie R. Co.* (1870), 41 N. Y. 525, 532; *Barry v. New York, etc., R. Co.* (1883), 92 N. Y. 289, 44 Am. Rep. 377; *Byrne v. New York, etc., R. Co.* (1887), 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512; *Sweeney v. Old Colony, etc., R. Co.*,

supra; *Gordon v. Cummings* (1890), 152 Mass. 513, 25 N. E. 978, 23 Am. St. 846, 9 L. R. A. 640.

While the rules before indicated relating to the duty of the owner or occupant of premises to the trespasser and a licensee thereon, are generally applicable in cases of the character here involved it does not follow that there are no exceptions thereto. They, like all other general rules, have their exceptions, as is evidenced by the many cases decided by the courts of appeal of this State as well as those of many other jurisdictions to which have been applied the doctrine of last clear chance and the attractive nuisance doctrine, concerning which we will have more to say later on in this opinion.

Our investigation of this question leads us to conclude that much of the apparent confusion in the exceptional cases

in different jurisdictions has arisen from an effort

2. to put the injured party in the particular case in one or the other of said relations to the owner of the premises and in then applying the general rule applicable to such relation, when in fact such particular relationship was not necessarily important; but rather the true and ultimate test of actionable negligence in each case should have been, Did the owner of the premises under the particular circumstances of the case involved owe *any duty* to the party injured on his premises and, if so, was such duty violated and, did such violation result in the injury complained of? Probably no question of law presents a greater diversity of opinion, and expression thereof, among the courts of different jurisdictions than the question whether a railroad company owes to the trespasser on its tracks, whether adult or a child *non sui juris*, any duty of care or vigilance to discover such presence. In the case of *Palmer v. Oregon Short Line R. Co.* (1908), 34 Utah 466, 98 Pac. 689, 16 Ann. Cas. 229, the learned judge who wrote the opinion collected and properly grouped many of the authorities giving expression to said several holdings of the courts of different jurisdic-

tions on said questions. As stated in that opinion it will be found from an examination of the cases there cited that some jurisdictions expressly hold that a railroad company owes even to the adult trespasser the duty of some care and vigilance to discover his presence on the track, but such cases are found mainly in those jurisdictions where the duty to observe such care has been imposed by statute. For authorities so holding see said case, pp. 482, 483. Other jurisdictions hold in effect that no duty rests upon a railroad company to keep a lookout for trespassers whether young or old. For list of such authorities, see said case, pp. 477, 478. Some of the cases there cited disclose that the rule which they are cited to support has been strictly applied even to adult *licensees* and regardless of the place where the injury was inflicted whether in town or country.

There is then what has been termed in some jurisdictions an intermediate rule applied both to trespassers and licensees, which, in *Palmer v. Oregon Short Line R. Co.*, *supra* 479, is stated as follows: Where a railroad company "has permitted the public the free use of the tracks to pass along or over, and this use is open and continued for a long period of time and by a large or considerable number of people, or where the railroad runs through thickly populated portions of a city, town, or village where people frequently go upon or pass over the tracks for such a length of time that the employes of the railroad company may be charged with notice, or when such notice is directly given them, then in all such cases, although the injured person be a trespasser, still the railroad company, having reason to expect that some one may be on or near the track, must act accordingly, and keep a lookout and give timely warning in order to prevent a collision, and a failure to exercise ordinary care in keeping a lookout and in giving warning may be negligence for which even a trespasser is entitled to recover, provided he is not guilty of contributory negligence which is the proximate cause of the injury. In cases of

adults being at such place, the employees of a railroad company are not required to either check the speed of the train or to stop it as soon as they discover the intruder. All that is required of them in the first instance is to give timely warning of the approach of the train. On giving such warning they have the right to assume that the intruder will leave the track. In case of children or infants, however, they may not indulge such a presumption, but must at once arrest the speed of the train as soon as they discover the children, or, by the exercise of ordinary care, ought to have discovered them, on the track or in a place of danger. This also applies to helpless adults who may be on the track or in a place of danger, when their helplessness is discovered, or, by the exercise of ordinary care, ought to be discovered.”

Erie R. Co. v. Swiderski (1912), 197 Fed. 521, 117 C. C. A. 17; *Snare & Triest Co. v. Friedman* (1909), 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367; *Alabama, etc., R. Co. v. Guest* (1905), 144 Ala. 373, 39 South. 654; *Southern R. Co. v. Chatman* (1905), 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675; *Louisville, etc., R. Co. v. Daniel* (1906), 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190; *Green v. Chicago, etc., R. Co.* (1896), 110 Mich. 648, 68 N. W. 988; *Bouwmeester v. Grand Rapids, etc., R. Co.* (1887), 67 Mich. 87, 34 N. W. 414; *Smalley v. Southern R. Co.* (1899), 57 S. C. 243, 35 S. E. 489; *Fearons v. Kansas City, etc., R. Co.* (1904), 180 Mo. 208, 79 S. W. 394; *Chesapeake, etc., R. Co. v. Rogers* (1902), 100 Va. 324, 41 S. E. 732; *Illinois Cent. R. Co. v. Murphy* (1906), 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352; *Johnson v. Lake Superior, etc., Transfer Co.* (1893). 86 Wis. 64, 56 N. W. 161; *Johnson v. Louisville, etc., R. Co.* (1906), 122 Ky. 487, 91 S. W. 707; *Davis v. Chicago, etc., R. Co.* (1883), 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; *Cassida v. Oregon R., etc., Co.* (1887), 14 Or. 551, 13 Pac. 438; *Felton v. Aubrey* (1896), 74 Fed. 350, 20 C. C. A. 436; *Atchison, etc., R. Co. v. Smith* (1882),

28 Kan. 541; *Givens v. Kentucky Cent. R. Co.* (1891), 12 Ky. L. Rep. 950, 15 S. W. 1057; *Martin v. Hughes Creek Coal Co.* (1912), 70 W. Va. 711, 75 S. E. 50, 41 L. R. A. (N. S.) 264, and annotations; *Smalley v. Rio Grande, etc., R. Co.* (1908), 34 Utah 423, 98 Pac. 311; *Young v. Clark* (1897), 16 Utah 42, 50 Pac. 832; *Hyde v. Union Pacific R. Co.* (1891), 7 Utah 356, 26 Pac. 979. Another able discussion of the question under consideration and valuable collection both of the decided cases and the expression of the law writers applicable thereto will be found in the case of *Edgington v. Burlington, etc., R. Co.* (1902), 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561, and annotations.

In many of these cases to which the attractive nuisance doctrine and the doctrine of last clear chance have been applied, where children have been involved, a careful

10. examination and scrutiny of the facts upon which they rest will disclose that such duty to observe care is not, necessarily, dependent on a contractual relation between the parties, nor does it necessarily depend on any consideration of benefit received or to be received, by either from the other, or any promise, inducement or invitation, express or implied, extended by the one to the other, but it will be found that such duty, in its last analysis, arises out of the emergency and necessities presented by the facts of the particular case and rests primarily upon, and has its origin in an inherent sense of justice and humanity present in every civilized and enlightened people which places so high a regard on life and limb that it will not permit their possessor, when helpless and in a situation of peril, to be deprived of the one or injured in the other by an affirmative act of negligence of another in the use of his property when such person *has knowledge*, actual or constructive of the helpless and perilous situation of the former, without charging such person with the damages resulting from such negligence, even though the possessor of such life or limb may have been guilty of a negligent act that was a remote cause

of such injury, in that such negligent act brought him into such place, or situation of peril. In other words, the duty or debt of care in such cases may arise from the fact of the presence of such child on such premises in a situation of peril, and the *knowledge* of the owner thereof, actual or constructive, of his perilous situation. In such cases such *knowledge* imposes on such owner the duty of observing the maxim old as the civil law, *sic utere tuo ut alienum non laedas*, etc., from which duty such owner can not divorce himself regardless of the relation that such person in peril may sustain to him, whether as trespasser, or licensee by permission or invitation. This maxim lies at the bottom of all these exceptional cases, whether found in the class designated "last clear chance" cases, or in the class designated "attractive nuisance" cases, and it will be found from a careful examination of the facts upon which such cases rest that said maxim has in each case been called into operation by reason of the *knowledge*, actual or constructive, on the part of the owner of the premises of the perilous and helpless situation and exposure to danger of the person on, or likely to come on such premises.

Appellee insists that this case falls within that class to which the attractive nuisance doctrine has been applied.

With this contention we agree to the extent only that

2. the case is controlled by the maxim just indicated; otherwise such doctrine has no application to the facts of this case, except in the sense hereinafter indicated. Our understanding and interpretation of the cases to which the attractive nuisance doctrine has been applied, leads us to the conclusion that, strictly speaking, such doctrine has application to those cases only where the injury itself results from and is proximately caused by the appliance, machinery, instrument or thing relied on as the attractive nuisance, and does not apply to injuries resulting from some affirmative negligence of the owner of such premises separate from and in no way connected with such nuisance. Indeed,

there seems to be, in some jurisdictions, a disposition to limit such doctrine to "cases of attractive and dangerous machinery" (*Wheeling, etc., R. Co. v. Harvey* [1907], 77 Ohio St. 235, 83 N. E. 66, 75, 122 Am. St. 503, 19 L. R. A. [N. S.] 1136, and authorities cited), but for the purposes of this case we need not indicate any holding on this particular phase of this question. If the wheat in the cars and along the track, which constitutes the attractive nuisance relied on in this case, has any importance on the question here involved, it must be that only of furnishing a reason for the presence of children, decedent included, on the appellant's premises, and does not furnish the proximate cause of decedent's death. The proximate cause of such death was the separate, independent affirmative act of appellant in running its car against and over decedent, and with such act the alleged attractive nuisance was in no way connected, except as hereinafter indicated. We seriously doubt whether the facts disclosed by the complaint and the evidence show anything on, or any condition of appellant's premises that could be said to be so luring and inviting as to constitute an attractive nuisance, within the meaning of any of the cases relied on by appellee. Certainly nothing appears from the evidence that could be construed as an invitation, by appellant, express or implied to decedent, and those with him, to come on such premises. If so, then a similar invitation is extended by every farmer near a town or city, who permits the fruit of his peach or apple orchard to ripen on the trees and fall upon the ground and attract the boys from such town or city. Such ripe or fallen fruit would doubtless be a temptation to such boys but not necessarily an invitation to them by the owner to come on his premises to get them. The fact that boys for a number of years had frequently gone on appellant's premises to gather up the wheat, might show such knowledge of, and acquiescence in, such conduct and habit of such boys as to amount to a license or permission by appellant to come upon such premises, and therefore

make them licensees by permission rather than trespassers, but no invitation, express or implied, could be inferred from such conduct alone. Under the definitions above indicated of a licensee by invitation, and a licensee by permission, we are of the opinion that, giving to appellee the benefit of an interpretation of the evidence most favorable to her contention, her deceased son was on appellant's tracks when killed as a licensee by permission only.

While, under some of the decisions above cited, it may be important to determine whether the deceased when injured was on appellant's premises as a *licensee* rather than as a *trespasser*, under the facts of this case and the decisions applicable thereto, we are of the opinion, for the reasons herein indicated, that the other question, viz., whether he was on such premises as a *licensee by permission*, or as a *licensee by invitation*, is not of controlling importance. The facts show that he was there and, that the appellant and its agents had every reason to *know* or *anticipate* that he, or some other child would probably be on its tracks at the time it moved the cars that caused the fatal injury.

As affecting the question of proximate cause of decedent's death the doctrine of last clear chance comes more nearly being applicable to this case than the attractive nuisance doctrine. Indeed, the facts of this case by analogy warrant the application of such doctrine, even though the decedent be regarded as a trespasser, if we should follow to its logical conclusion the rule adopted in some jurisdictions and, in fact, in some of the more recent cases of this court and the Supreme Court. However, confusion is likely to result from and, in our judgment, much of that found in the decided cases has resulted from an effort to classify and bring exceptional cases within a particular class to which one of said suggestive names has been given, rather than to measure and judge them by the fundamental maxim and test above indicated which is applicable alike to all the exceptions.

Applying to this case this maxim and test, we ask, Did the appellant owe to decedent a duty to observe ordinary care toward him? Whether such a duty existed in

11. this, or in any case, is a question of law for the court, while the question whether such duty was properly performed is a question of fact for the jury. However, in discussing this question and the decisions which throw light on it, we will, of necessity, be required to refer to the law as it has been applied to said relations of trespasser and licensee between the railroads and the party injured thereon, because in most instances the decisions discuss the question from such standpoint.

Some of the cases above cited indicate that a railway company owes a higher duty to the infant trespasser on its tracks than it does to the adult trespasser, even in

12. the matter of the exercise of care and vigilance to discover his presence on the track; but the appellate tribunals of this State seem to be committed to the doctrine, and correctly we think, that as to the duty of discovery on its premises, when it has no knowledge, actual or constructive, of such presence or probable presence the duty of the railway company is the same as to both, viz., such company owes no duty to either to keep a lookout for his presence, but it owes to each the duty of ordinary care after there is knowledge of such presence, actual or constructive, and ordinary care may require care different in kind and greater in degree where a child of tender years is involved. *Indianapolis, etc., R. Co. v. Pitzer* (1887), 109 Ind. 179, 182, 185, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387, and authorities there cited; *Penso v. McCormick* (1890), 125 Ind. 116, 120, 25 N. E. 156, 21 Am. St. 211, 9 L. R. A. 313; *Wabash R. Co. v. DeHart* (1903), 32 Ind. App. 62, 65 N. E. 192; *Chicago, etc., R. Co. v. Fox* (1906), 38 Ind. App. 268, 274, 275, 70 N. E. 81. See, also, *Barrett v. Southern Pac. Co.* (1891), 91 Cal. 296, 27 Pac. 666, 25 Am. St. 186; *Twist v. Winona, etc., R. Co.* (1888), 39 Minn. 164, 167,

Cleveland, etc., R. Co. v. Means—59 Ind. App. 383.

39 N. W. 402, 12 Am. St. 626; *Palmer v. Oregon Short Line R. Co.*, *supra*; *Edgington v. Burlington, etc., R. Co.*, *supra*.

The exception to the rule announced in favor of infant trespassers in some of the cases requiring vigilance to discover their presence on the track of a railroad company results from confounding the duty owing to such trespassers with their contributory negligence, and as was said in the case of *Nolan v. New York, etc., R. Co.* (1855), 53 Conn. 461, 474: "We do not think that the tender age * * * of one of these plaintiffs can have the effect to raise a duty where none otherwise existed. The supposed duties have regard to the public at large, and cannot well exist as to one portion of the public and not to another under the same circumstances. In this respect children, women and men are upon the same footing. In cases where certain duties exist infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public, must, as a rule, have reference to all classes alike." If any other rule were adopted than that here indicated, it would "result in requiring the railroad company to keep a lookout always and everywhere for trespassers, and the presumption of a clear track would be entirely ignored". *Palmer v. Oregon Short Line R. Co.*, *supra*.

The line of cases, however, which adopt the middle ground above indicated, in which we think we may include those of the courts of this State, all recognize that where the person on the track is a child *non sui juris* of whose presence the railroad company has *knowledge*, actual or *constructive*, a different rule obtains. In such case the company must operate its cars on such tracks with reference to the probable presence of such child and use ordinary care to avoid injuring it, otherwise no additional care is imposed on the company over that which it owes to the adult trespasser on its tracks.

Appellant concedes, in effect, that there is some evidence

in the case which would warrant the inference that decedent was on appellant's premises when killed by its sufferance, permission or active acquiescence and hence was a licensee by permission, but, that it owed him "no active vigilance". The form of expression here used is that used in many of the adjudicated cases and implies that some vigilance not active in character, is required in such cases even in favor of the adult licensee. This is the effect of the holdings in most jurisdictions. *Pomponio v. New York, etc., R. Co.*, *supra*; *Woolwine v. Chesapeake, etc., R. Co.*, *supra*; *Sweeny v. Old Colony, etc., R. Co.*, *supra*; *Beck v. Carter* (1877), 68 N. Y. 283, 23 Am. Rep. 175; *Barry v. New York Cent. R. Co.* (1883), 92 N. Y. 289, 44 Am. Rep. 377; *Stevens v. Nichols* (1892), 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459; *Corrigan v. Union Sugar Refinery* (1868), 98 Mass. 577, 96 Am. Dec. 685; *Steward v. Harvey College* (1866), 94 Mass. 58, 67; *Gallagher v. Humphrey* (1862), 6 L. T. (N. S.) 684; *Sullivan v. Waters* (1864), 14 Ir. C. L. 460, 474; *Indermaur v. Dames*, *supra*; *Corby v. Hill* (1858), 4 C. B. (N. S.) 556, 93 E. C. L. 556; 18 Am. and Eng. Ency. Law (2d ed.) 1136, 1137. These authorities authorize the statement that, generally speaking, such licensee, while on the premises, must take them as he finds them with all their risks and dangers; and that the owner owes him no duty of making any active effort to discover his presence or the danger of his particular surroundings at any particular time while on such premises but, if the owner discovers his presence and sees him in a situation of peril, he may not do an affirmative act which might reasonably be expected to increase such peril. The rule thus stated, even when applied to adults, should have few, if any exceptions.

All the authorities agree that the care which the owner of the premises owes to a child thereon by his acquiescence is different in kind and greater in degree than that which he owes to the adult under like circumstances. For an instructive discussion of and citation of authorities in sup-

port of this statement see *Edgington v. Burlington, etc., R. Co., supra*. So we say that by analogy constructive knowledge of the presence of a child licensee in a position of peril imposes at least as much affirmative care on the part of the owner of such premises before he does an affirmative act that might imperil the life or limb of such child as would actual knowledge of the presence of a helpless trespasser in a position of peril on such premises impose on such owner before doing an affirmative act to increase the peril of such trespasser.

The owner of the premises owes the adult licensee no duty of active vigilance to discover his presence or his surroundings while on his premises by permission only, because such adult is presumed to go there with the understanding that he will take the premises as they are, with all the uses to which the owner may subject them while there, and that he will look after his own safety and welfare, and that he has discretion and judgment to do so. In other words, the owner of the premises does not know and has no reason to anticipate that such adult licensee will place himself in a situation of peril. To indulge such an assumption when a child licensee of immature years, judgment and discretion is involved would be against our common understanding and reason and lacking in every element of humanity and justice. Constructive knowledge on the part of a railroad company that children *non sui juris* are on its tracks, or probably will be on its tracks, at a particular place, of necessity, carries with it knowledge of the peril or probable peril and helpless condition of such children, and hence the vigilance or care, which in the first instance was only negative in character, may become affirmative in the second instance and require that the company in such case shall, in some degree, at least, exercise for the child the care and vigilance which it must *know* the child is unable to exercise for itself, and, must not, *by an affirmative act* of omission or commission, expose such child to a danger

which it *knows*, or has reason to believe is unknown to and not understood or appreciated by such child. The duty of ordinary care which the owner of premises owes to the child licensee thereon is recognized and affirmed even in those jurisdictions which refuse to recognize or apply the attractive nuisance doctrine, as evidenced by the case of *Wheeling, etc., R. Co. v. Harvey, supra*. On this subject the court in that case in its criticism of a case which applied the turntable doctrine said: "The decision in that case did not require the application of the doctrine of the turntable cases, but rests upon long-settled principles of law. * * * The boys were held to be licensees, * * * it was the duty of the company to warn them of the hidden peril, or to use care that they were not injured thereby. In the opinion [*Harriman v. Pittsburgh, etc., R. Co.* (1887), 45 Ohio St. 11, 31, 12 N. E. 451, 4 Am. St. 507] Williams, J., says, 'Hence where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road, at a given point, without objection or hindrance, it should, in the operation of its trains, and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons so using its road.' " The above language from the opinion by Williams, J., is quoted with approval by the Supreme Court in the case of *Penso v. McCormick, supra*, 120, 121.

We are aware that there are expressions in some of the Indiana cases, especially in the case of *Cannon v. Cleveland, etc., R. Co., supra*, which seem to be in some measure out of harmony with the authorities adopting said middle ground. If the case just referred to is to be understood as holding that a railroad company for a long period of time may permit and acquiesce in the continuous use of its tracks at a particular place in a populous city by the public generally, including *children*, and yet incur no additional and corre-

Cleveland, etc., *R. Co. v. Means*—59 Ind. App. 383.

sponding obligation to use care in the operation of its trains at such point, we think it is out of harmony with the great weight of authority in our own State as well as that of other jurisdictions. Some of the authorities make the duty to use ordinary care in such cases depend on whether the facts and circumstances of the particular case were such as to *indicate to the owner* or occupant of the premises that an injury to some member of the public might probably occur in case of his failure to use such care. *Penso v. McCormick*, *supra* 119, 123; *Young v. Harvey* (1861), 16 Ind. 314, 315; *Durham v. Musselman* (1827), 2 Blackf. 96, 18 Am. Dec. 133; *Graves v. Thomas* (1884), 95 Ind. 361, 48 Am. Rep. 727.

It does not follow from what we have said that a
14. railroad company is an insurer of the safety of children who come on its premises, either as licensees or trespassers, or that it at all times and at all places owes them the duty of any care. Its obligation is simply that which should attach and under the law "attaches to every member of society when he undertakes to exercise a personal right in a manner which may affect the welfare or safety of another member, the obligation of reasonable care * * * (and this) may, at times, seem to be a burden, but its enforced observance is never a wrong, whether applied to railroad companies or to individuals." *Edgington v. Burlington, etc., R. Co.*, *supra* 422, 446. Reasonable care in such cases does not impose any duty where the presence of a child on its tracks is merely possible or where such duty or care imposes on the company an unreasonable limitation on the usual and ordinary use of its property. A correct and pertinent statement affecting this phase of the question will be found in the case of *Chicago, etc., R. Co. v. Krayenbuhl* (1902), 65 Neb. 889, 902, 904, 91 N. W. 880, 881, 883, 59 L. R. A. 920, where it is said: "It is true, as said in *Loomis v. Terry* [1837], 17 Wend. [N. Y.] *496, *500, 31 Am. Dec. 306, 'the business of life must go forward'; the means by which it is carried forward cannot be rendered absolutely

safe. Ordinarily, it can be best carried forward by the unrestricted use of private property by the owner; therefore the law favors such use to the fullest extent consistent with the main purpose for which, from a social standpoint, such business is carried forward, namely, the public good. Hence, in order to determine the extent to which such use may be enjoyed, its bearing on such main purpose must be taken into account, and a balance struck between its advantages and disadvantages. If, on the whole, such use defeats rather than promotes the main purpose, it should not be permitted; on the other hand, if the restrictions proposed would so operate, they should not be imposed. * * * Hence, in all cases of this kind, in the determination of the question of negligence, regard must be had to the character and location of the premises, the purpose for which they are used, the probability of injury therefrom, the precautions necessary to prevent such injury, and the relations such precautions bear to the beneficial use of the premises."

In the last clear chance cases *knowledge* of the person in peril creates the duty on the part of the defendant to use ordinary care, and whether the knowledge which

2. creates such duty must be actual rather than constructive, under the more recent cases, depends on whether the person in peril is in a helpless condition. *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091; *Union Traction Co. v. Bowen* (1915), 57 Ind. App. 661, 103 N. E. 1096. An infant *non sui juris* on a railroad track, as was well expressed by Lairy, J., in the case last cited, is "in a like situation with one whose foot is fast in a frog, or who for some other reason is powerless to extricate himself from the threatened danger by the exercise of care. As to such persons, it frequently has been held that a company operating cars on public streets owes the duty to discover their peril and to use reasonable care to avoid injuring them." We do not understand that these cases hold, nor do we desire to be understood

as holding, that the helpless condition of the child, or of the person with his foot in the frog, creates a duty to use ordinary care with reference to such person when no such duty existed before. That is to say, if there was nothing to charge the railroad company with knowledge of the presence or probable presence of the child on the track, its helpless condition would create no duty to exercise ordinary care in its favor, but the company being once charged with constructive knowledge of the probable presence of children on its tracks (as in the instant case) or charged with knowledge of the presence of the public generally on its tracks (as in the cases last cited) which necessarily includes helpless adults as well as helpless children, the knowledge of the presence or probable presence of those who are thus unable to help themselves necessarily carries with it knowledge of their helpless condition, and hence gives rise to a duty to use care corresponding to the emergency created by their helpless condition, and such care of necessity may be affirmative in character.

Constructive knowledge of the probable presence of the adult on the track in such cases charges the company with knowledge of his probable presence alone, and not with knowledge of his imminent peril; but being charged with the duty of looking and seeing it is also charged with knowledge of any helpless condition of the person in peril which such looking might disclose. Hence the distinction before indicated in favor of the child and helpless adult which imputes actionable negligence in their favor where there is only constructive knowledge of their presence on the tracks. So we say that the conclusion here reached is in perfect harmony with the reasoning of the last clear chance cases as expressed in our later decisions.

So likewise do the turntable cases expressly recognize that the duty of ordinary care where a child trespasser or licensee is involved imposes an additional affirmative care in favor of such child that does not exist in favor of an adult

trespasser or an adult licensee. It is conceded in these cases that in so far as the affirmative duty to lock or secure the turntable exists, that it exists in favor of the child only and not in favor of adults. The duty to use care in respect to children in such cases arises from constructive knowledge alone. The invitation which the law imputes to the owner of the premises in the turntable and attractive nuisance cases, in our judgment, is important for the reason only that it shows that when such owner locates his turntables at a place where children are liable to pass or congregate he knows that it will draw to it such children and hence should be charged with constructive *knowledge* of their presence or *probable presence*, and the *danger* likely to result to them on account of any failure of his to lock or otherwise safeguard such turntable, so that such children may not be exposed to its dangers.

As before indicated, it is the *knowledge* actual or constructive of the presence or probable presence on his premises of a helpless human being in peril that creates and gives birth to the duty of the owner thereof to use care, and in the instant case, whether the wheat under the cars could be said to be an attractive nuisance, and an implied invitation on appellant's part to children to come on its premises is not important, because such implied invitation, if it existed, as before stated is important for the purpose only of showing an excuse for decedent's presence, and a reason for charging appellant with constructive *knowledge* of his presence. The averments of the complaint show, and there was evidence from which the jury may have found that appellant had such constructive knowledge and hence, for the same reason that the owner of the premises should lock or guard an attractive nuisance thereon, appellant in this case should not have moved its cars without some warning or other act evidencing ordinary care towards decedent.

The last clear chance doctrine and the turntable doctrine are both recognized by the appellate tribunals of this State,

and whether appellee's decedent was a trespasser or a licensee by permission or by invitation, or whether the facts of the instant case bring it strictly within the particular class of cases to which either of said doctrines are generally understood to apply, for the reasons herein indicated, is not necessarily material. The fact remains that under the evidence the jury had a right to infer that appellant *had constructive knowledge of the presence of decedent in a situation of peril from which he was unable to extricate himself when it ran its cars over him and killed him* and hence the fundamental maxim and test for its application, which determines actionable negligence in all the exceptional cases herein cited, requires us to hold that appellant in this case owed to decedent the duty of ordinary care before moving its cars down upon him. There was evidence show-

15. ing that it gave no signal or warning of any kind before moving its engine and cars. Under such evidence the question whether it exercised the degree of care that an ordinarily prudent person similarly situated would have exercised and whether the lack of such care was the proximate cause of decedent's death were questions of fact for the jury.

The question of contributory negligence on the part of appellee in trusting the decedent to the care of a twelve-year-old brother, and the question of the contributory

16. negligence on the part of such younger brother, are also raised by appellant's brief, but on these questions there was evidence tending to support the averments of the complaint, and hence, under the authorities applicable thereto, such questions were clearly questions of fact for the jury.

Some question is also raised as to instructions given and refused but, if we are correct in our determination of the controlling question in this case, some of the instructions were more favorable to appellant than the law warranted and neither the giving, nor the refusal to give any of them

presents any error on which a reversal of the judgment below should be granted.

We find no error in the record and the judgment is therefore affirmed.

ON PETITION FOR REHEARING.

HOTTEL, C. J.—Appellant has filed a petition for rehearing in this cause with briefs in support thereof in which it very earnestly insists that the court in its original opinion has run counter to the decisions of the Supreme Court and to all authority in all jurisdictions where the same facts have been before the courts, and that the opinion “declares a new rule of conduct”. We assume that this statement is based on appellant’s understanding of the facts of the case which, put in its own words as set out in such briefs, is as follows: “Stripped of all sentiment, the facts were that over the repeated objections of the appellant, men and boys at times did come upon its tracks at a place on its private highway between streets, not used as a highway or a playground, to steal wheat that dropped from cars and sell it; that decedent’s custodian invited him on the tracks where there were ten stationary cars on a main lead, and later directed him to crawl under the ninth and tenth cars from a point where and at a time when appellant’s employes were about to couple an engine and six cars to said ten cars; that decedent was killed while crawling under the cars while appellant’s employes were engaged in the act of coupling; that appellant had one employe on the first of the backing cars and one walking ahead of the cut, and the engine bell was ringing; that the three boys were concealed under and between the ninth and tenth cars and were not seen by the employes of the appellant, and could not have been seen except by searching under and between the ten standing cars.”

This statement could hardly be regarded as correct

17. even if measured by the evidence most favorable to appellant, whereas the court in determining the ques-

tion it was considering in the opinion was required to look only to the evidence most favorable to appellee.

As stated in the original opinion our examination of the evidence convinces us that each material averment of the complaint had some evidence for its support. It is undisputed that appellee's decedent was killed, not on appellant's main line, but on a switch or side track which led from its main line along the south embankment of the canal of the Indianapolis Water Company across West Street and Blackford Street in said city to the manufacturing plant of Love Brothers. Both West Street and Blackford Street were public thoroughfares in said city, and the city of Indianapolis maintained a public park, called "Military Park", immediately north of said canal which was bounded on the north by New York Street, on the east by West Street, and on the west by Blackford Street. This park was in a densely populated part of the city, was supplied with amusements of various kinds, and matrons were kept in attendance to look after the children who came there to play. During the summer and autumn months children in great numbers congregated in the park and in its vicinity to play. The southwest corner of the park was within seventy-five feet of appellant's switch at the point where it crossed Blackford Street. The Acme-Myers Milling Company was located at this corner, and it was at or near this corner that appellee's decedent was run over and killed by one of appellant's cars. The car that ran over him was one of several wheat cars that had been placed on such switch in front of the milling company. Some of these cars had been unloaded and quantities of wheat had leaked from the cars, or in some manner dropped on the ground under such cars, and on the track near the cars. The leakage of wheat from cars on appellant's tracks at said point had been more or less frequent and continuous for a number of years, and there was an abundance of evidence showing that the children of the park and vicinity had been in the habit of fre-

quenter appellant's tracks at this point. They were frequently seen on and near such tracks at said point gathering up wheat and playing and fishing along the banks of the canal. The testimony of one witness on this subject as set out in appellant's original brief is in substance as follows: That he resided at 126 North Blackford Street and was employed by the Union American Cigar Company in the wholesale cigar business; that he had lived at his present address nine years; that he had seen children around the canal there fishing and around the railroad track; that the children fished from the trestlework over the canal and off the bank on the north and south side; that he also "saw them after school take little baskets and go along the cars and gather wheat, and in the winter time and in the summer time often during the day I would be passing by and I would see them gathering wheat around the cars and on the tracks, where the leakage of the cars would be"; that "they would carry brooms and a little basket and go along and sweep it up along the tracks. I have seen them there both when the cars would be standing there and when the tracks would be vacant and there would be nothing on the right of way"; that he had noticed this condition in the yards of the Acme Flouring Mill; that he had noticed children there in the morning, at noon and evening, and on Sunday; that there was no passage of trains on Sunday; that the people who gathered wheat ran from children to men; that he had seen eight or ten children on the right of way at one time; that the wheat he saw was a foot and a half or two feet outside the rails; that he never noticed any wheat between the tracks; that it was alongside where it had been swept or kicked out of the cars.

It is but fair to appellant to say in this connection that one of the custodians of the park testified that he had seen some of appellant's employes on different occasions drive the boys off the tracks and a member of the police force of Indianapolis testified to an occasion when some one (he

did not know whether boys or not) had broken one of appellant's cars on said switch, and ten bushels or more of wheat had run on the track, and on that occasion some railroad officer whom he did not know asked him to "assist him in trying to break up the *wheat stealing on the railroad*".

We have indicated enough of the evidence to show that appellant's switch track at the point where appellee's decedent was killed was located in a densely populated part of the city of Indianapolis and near one of the parks of such city which was habitually frequented by large numbers of children; that for a number of years prior to decedent's death the children of the park and its vicinity had been in the habit of going upon appellant's said track to gather up the scattered wheat thereon and to play and fish along the bank of the canal; that appellant knew or should have known of this custom.

The only serious conflict in the evidence on this branch of the case relates to the question whether the custom had been passively acquiesced in by appellant, and as

18. there was some evidence tending to support the general verdict on this question this court is bound by such verdict. Therefore the law question which the court was required to determine was: Did appellant owe to appellee's decedent the duty of exercising toward him ordinary care at the time it moved its train against the car that run over and killed him? In our original opinion we answered this question in the affirmative and based our answer on the assumption that the facts of this case bring it within the rule therein set out as being the intermediate rule, and that the weight of authority in Indiana, and in a majority of other jurisdictions favor and follow such intermediate rule. We still believe that a careful examination of the authorities there cited will show our conclusion to be correct.

Appellant also says in its brief that: "Under the rule laid down by the court in this case, every property owner, before proceeding to perform any lawful work on his prop-

erty, must first dig out concealed intruders, and then patrol his premises to keep such persons out of danger." Upon a careful reëxamination of the opinion we can find nothing in it which can warrant such a construction. The opinion is expressly based on the theory that appellant owed to the decedent the duty of ordinary care only, and that under the facts of this case it was a question for the jury to say whether such duty had been performed by appellant.

It is true, that in discussing a proposition contained in appellant's brief that "the owner or occupant of premises owes no *active* vigilance to one who enters upon such premises by mere sufferance, permission or passive acquiescence", we stated, in effect, that, under the law, ordinary care where children *non sui juris* are involved may be different in kind and greater in degree than where adults are involved, and that such care, where the occupant of the premises knew that children *non sui juris* were present thereon and in a situation where they were likely to be exposed to imminent peril, might be affirmative in character, depending on the facts and circumstances of the particular case. This statement is supported by the authorities there cited. The opinion, however, nowhere asserts that the care necessary in any case is more than ordinary care; nor does the opinion anywhere attempt to indicate, or declare as a matter of law that any particular thing is necessary to be done in order to constitute ordinary care. The evidence on this branch

15. of the case was not set out in detail, in the original opinion but it is expressly stated therein that "there was evidence showing that it (appellant) gave no signal or warning of any kind before moving its engine and cars", and that "under such evidence the question whether it (appellant) exercised the degree of care that an ordinarily prudent person similarly situated would have exercised, and whether such lack of care was the proximate cause of decedent's death were questions of fact for the jury." It is true that one of appellant's witnesses testified that there

was an automatic bell ringer which was ringing when they went in to get the six cars, but this evidence is contradicted by other witnesses who testified that they heard no bell or warning of any kind. The switchman who made the coupling testified (we quote from appellant's original brief): "That before attempting to make the coupling he had not made any effort to ascertain whether there were any boys under or about the cars; that when he was hanging on the car he could see all the way to Blackford Street; that he could not see on the south side of the cars; that he was watching the coupling and was not looking ahead to see whether any one was under or about the cars." Under such a state of facts this court could not say, as a matter of law that the appellant had used ordinary care to prevent injury to decedent. On the contrary the question was clearly one of fact for the jury.

We believe the original opinion is supported both by reason and authority, and hence see no reason for granting the rehearing. The petition for rehearing is therefore overruled.

NOTE.—Reported in 104 N. E. 785; 108 N. E. 375. As to, so called, attractive nuisances, see 59 Am. Rep. 23. As to the care required of railroad companies to prevent injuring small children on the track, see 25 L. R. A. 784. As to the duty to keep lookout for infant trespassers on track, see 8 L. R. A. (N. S.) 1079. As to the duty of the owner of premises to protect licensee against hidden dangers, see 17 L. R. A. (N. S.) 916. On the duty of a property owner to trespassing child, see 32 L. R. A. (N. S.) 559. As to the doctrine of "attractive nuisance" as applied to injury from cars, see 19 L. R. A. (N. S.) 1136. As to the application of turntable or attractive nuisance doctrine to standing railroad cars, see Ann. Cas. 1912 D 916. See, also, under (1) 3 C. J. 1409; 2 Cyc. 1013; (2, 13, 14) 33 Cyc. 773; (3) 29 Cyc. 442; (4, 6) 29 Cyc. 449; (5) 29 Cyc. 453; (7) 33 Cyc. 754; (8) 29 Cyc. 454; (9) 29 Cyc. 457; (10) 29 Cyc. 445; (11) 29 Cyc. 634; (12) 33 Cyc. 790, 802; (15) 33 Cyc. 903; (16) 29 Cyc. 1649; (17, 18) 3 Cyc. 348.

NATIONAL LIVE STOCK INSURANCE COMPANY
v. WOLFE.

[No. 8,342. Filed October 8, 1914. Rehearing denied March 2, 1915.
Transfer denied June 24, 1915.]

1. **INSURANCE.—Action.—Complaint.—Answer in Abatement.**—Where a policy of live stock insurance provided that the insurance was to be paid sixty days after proof of loss had been made by the insured and received by the company, and the complaint, in an action on the policy, alleged facts showing a waiver of such provision by a denial of liability, an answer in abatement on the ground that the action was prematurely brought, because brought before the expiration of such sixty-day period, was insufficient in the absence of any statement either by direct allegation or inference that such sixty-day clause had not been waived. pp. 421, 422.
2. **INSURANCE.—Policy.—Provisions Fixing Time for Payment.—Waiver.**—A clause in an insurance policy providing that the amount of the policy is to be paid sixty days after proof of loss has been made by the insured and received by the company may be waived so as to authorize an immediate action on the policy, by the company undertaking an investigation of its liability and then rejecting the claim and denying liability. p. 421.
3. **INSURANCE.—Live Stock Insurance.—Action on Policy.—Instructions.**—In an action to recover on a policy of live stock insurance, an instruction stating that in order for the defendant to secure an appraisalment of the animal insured the burden of proof was on defendant "to prove to your satisfaction" by a fair preponderance of the evidence that it requested plaintiff to consent to an appraisalment, that it selected an appraiser and notified plaintiff of that fact, and that it furnished blanks upon which to make the appraisalment, and further stating that if defendant had failed to prove such facts by a fair preponderance of the evidence the plaintiff was absolved from taking part in an appraisalment, was not objectionable as imposing on defendant by reason of the quoted words a higher duty than that of merely making proof by a preponderance of the evidence. p. 422.
4. **APPEAL.—Review.—Harmless Error.—Instructions.**—An instruction stating that if the jury find "under the instructions given" certain facts to be true, etc., though incorrect in the use of the quoted expression instead of advising that the finding must be from the evidence, was not fatally erroneous in view of other instructions clearly stating that the finding must be upon a fair preponderance of the evidence. p. 423.

National, etc., Ins. Co. v. Wolfe—59 Ind. App. 418.

5. **INSURANCE.—Live Stock Insurance.—Appraisement of Loss.—Instructions.**—In an action on a policy of live stock insurance, in which participation by the insured in the appraisement of loss was not made a condition precedent, failure by the insured to participate in such appraisement would not alone defeat his right to recover; hence instructions telling the jury that it was defendant's duty to request plaintiff to consent to an appraisement, and that the refusal of plaintiff to have anything to do with an appraisement was not of itself sufficient to relieve defendant from liability, correctly stated the law and were not conflicting. p. 424.
6. **EVIDENCE.—Written Instruments.—Admissibility of Evidence of Contents.—Necessity for Notice to Produce Original.**—In an action on a policy of live stock insurance, there was no error in admitting in evidence the contents of a letter alleged to have been written to the company pursuant to the terms of the policy, notifying the company of the sickness of the animal insured, though no notice to produce the original had been given as required by §502 Burns 1914, §479 R. S. 1881, since, in view of testimony of the agent of defendant in charge of its correspondence that no such letter had been received by defendant, notice on defendant to produce it would have been futile. p. 424.
7. **TRIAL.—Issues.—Delivery of Letter.—Question for Court or Jury.**—That a letter properly addressed and stamped was mailed makes a *prima facie* case of delivery in due course of mail, which, if denied, presents a question of fact for determination by the court or jury trying the cause. p. 424.
8. **EVIDENCE.—Written Instruments.—Notice to Produce.—Statutory Provisions.**—The purpose of §502 Burns 1914, §479 R. S. 1881, relative to notice to produce writings before parol proof of their contents can be admitted, is to require the production of the best evidence if possible. p. 424.
9. **APPEAL.—Review.—Intervening Error.—Affirmance.**—Where it appears from the whole record that the cause was fairly tried and a correct result reached, errors of a technical character and not prejudicial to the substantial rights of appellant can not work a reversal. p. 425.

From Daviess Circuit Court; *James W. Ogdon*, Judge.

Action by Harry M. Wolfe against the National Live Stock Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Mitchel S. Meyberg and *John H. Spencer*, for appellant.

Gardiner, Tharp & Gardiner and *Padgett & Padgett*, for appellee.

SHEA, J.—Action by appellee to recover on a policy of insurance issued by appellant on the life of a bull, of which appellee claimed to be the owner. Appellee's complaint alleged, in substance, that appellant was a corporation engaged in the live stock insurance business with its principal office in the city of Indianapolis, Indiana, and an agency in the city of Washington, Indiana, in charge of its agents Stewart A. Ridgway and Enoch Chattin; that on August 3, 1911, appellant, by policy made a part of the complaint by exhibit, insured appellee against loss by death or theft of a certain bull, in the sum of \$500, said animal being worth \$1,000 at the time of his death; that on October 14, 1911, and during the lifetime of the policy, said bull died of disease, due notice of which fact was given appellant by appellee in writing, a copy of which is made a part of the complaint by exhibit, but that before service of said notice on October 16, 1911, appellant "having theretofore received notice through its agents of the death of said bull, waived the notice required by the terms of said policy", and without waiting for final proof of said loss proceeded to investigate the facts surrounding the death of said bull, and appellee's claim under the policy, rejected the claim, denied liability under the policy, and refused to pay same; that appellee paid appellant a premium of \$40 and performed all agreements and conditions incumbent upon him by the terms of said policy; that he has demanded payment of the amount of the policy, but appellant has refused and rejected said demand and claim, although it took cognizance of said notice of the death of the bull, and investigated same and negotiated with appellee relative to the payment of said policy.

Appellant filed a plea in abatement which alleged substantially the following facts: That the contract and claim sued upon was not due at the time of the beginning of the cause of action; that the contract of insurance provided that it would insure appellee against loss by death

of a bull in a certain sum "to be paid sixty days after proof of the same has been made by the assured and received by the company"; that the bull died October 14, 1911, and appellant furnished appellee a blank proof of loss on October 16, 1911, which appellee on that day filled out and submitted to appellant; that appellee filed this suit on November 9, 1911, less than sixty days from the time proof of loss was submitted to appellant, and that it is less than sixty days from the time the animal died; that the cause of action was prematurely brought and the contract and claim sued on was not due at the time of the bringing of this cause of action. The court sustained appellee's demurrer to appellant's plea in abatement, also overruled its demurrer to the complaint and appellant then filed an answer in six paragraphs, the first a general denial. A trial of the issues formed resulted in a verdict and judgment for appellee for the amount of the policy, \$500.

The errors relied on for a reversal are the sustaining of appellee's demurrer to appellant's plea in abatement and the overruling of appellant's demurrer to the com-

1. plaint and its motion for a new trial. It is stated in point four of appellee's brief that the plea in abatement did not controvert the averments of the complaint, nor obviate facts which might be set up by special answer, that the company had waived the sixty-day clause contained in the policy by denying liability which might be pleaded in reply to the answer in abatement, and that the plea in abatement was therefore not suffi-

2. cient. It is true, in policies such as the one being considered, containing a sixty-day clause such as this one, that the company may waive its rights. For instance, if the insurer undertakes an investigation of its liability, and then rejects the claim and denies liability, the sixty-day clause may be deemed to be waived, and an action may be brought at once. *Germania Fire Ins. Co. v. Pitcher* (1903), 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Home Ins. Co. v.*

National, etc., Ins. Co. v. Wolfe—59 Ind. App. 418.

Marple (1891), 1 Ind. App. 411, 27 N. E. 633; *Whitten v. New England, etc., Ins. Co.* (1896), 165 Mass. 343, 43 N.

E. 121. In the case of *Ohio Oil Co. v. Griest* (1902),

1. 30 Ind. App. 84, 87, 65 N. E. 534, the court uses this language: "It has often been held by the courts of appeal in this State that a plea in abatement must be certain in intent in every particular; that it requires the utmost fullness, certainty and particularity of statement, leaving nothing to be supplied by intendment or construction; that the pleader must not only answer fully what is necessary to be answered, but must anticipate and exclude all such matters as would, if alleged upon the opposite side, defeat his plea." It is not stated in the plea in abatement either by direct allegation or by inference that the sixty-day clause was not waived. This would have been a good reply to the plea, and therefore under the rules as above stated, the demurrer was rightly sustained. The following authorities fully sustain this principle. *Lechner v. Strauss* (1912), 50 Ind. App. 414, 98 N. E. 444; *Moore v. Morris* (1895), 142 Ind. 354, 355, 41 N. E. 796; *Winer v. Mast* (1896), 146 Ind. 177, 183, 45 N. E. 66.

Instructions Nos. 10 and 11 given by the court on its own motion are criticised. Instruction No. 10 reads as follows:

"In order for the defendant to secure an appraise-

3. ment of the animal insured under the terms of the policy sued on, the burden of proof rests upon the defendant to prove to your satisfaction by a fair preponderance of the evidence, first, that it requested the plaintiff to consent to an appraisal; second, that it selected an appraiser and notified the plaintiff of that fact; and, third, that it furnished blanks upon which to make the appraisal. If the defendant has failed to prove these facts, as stated, by a fair preponderance of the evidence, then the court instructs you that the plaintiff would be absolved and released from all obligation to take any part in an appraisal of the property." It is insisted in criticism of this in-

struction that the words "to prove to your satisfaction" imposed upon the defendant a higher duty than the mere proof by a preponderance of the evidence; that the words "to your satisfaction", implied a higher order of proof than a mere preponderance. Respectable authority outside of this jurisdiction sustains appellant's contention. See *Rolf v. Rich* (1893), 149 Ill. 436, 35 N. E. 352. Our own cases, however, hold a contrary view. *Zonker v. Cowan* (1882), 84 Ind. 395; *Surber v. Mayfield* (1901), 156 Ind. 375, 60 N. E. 7.

Instruction No. 11 given by the court on its own motion reads as follows: "If you find under the instructions given, that the defendant did request the consent of the
4. plaintiff for an appraisalment of the animal insured, and that it selected an appraiser and notified the plaintiff of that fact, and also furnished blanks upon which to make the appraisalment, and that the plaintiff refused to have anything to do with the appraisalment, the court instructs you that such refusal on the part of the plaintiff would not of itself, under the terms and conditions of the policy sued on, release the defendant from liability on said policy." It is argued that this instruction is erroneous because it tells the jury if it found "under the instructions given", instead of "from the evidence" certain facts to be true, etc. The instructions are subject to some criticism. It is not a correct expression to say in an instruction—"if you find under the instructions given," etc., as stated in instruction No. 11, but instruction No. 5 clearly states that the plaintiff is required to prove by a fair preponderance of the evidence, all the material allegations of the complaint. This, we think, renders any inaccuracy that may be said to exist in the language of instruction No. 11 harmless, as the instructions must be considered as a whole.

Instruction No. 10 tells the jury that it was the duty of appellant to request appellee to consent to an appraisalment. No. 11 instructs the jury that the refusal of appellee to have

anything to do with the appraisalment was not of itself

5. sufficient to release appellant from liability under the terms of the policy. We think this is a correct statement of the law under the provisions of this policy. Appellee's participation in the appraisalment is not made a condition precedent, and hence his failure to do so would not alone defeat his action. There is no conflict in the language used in these instructions as claimed by appellant.

Other instructions tendered and refused, where they state the law correctly, are fully covered by the court's instructions.

It is very earnestly argued that the court erred in admitting the contents of a letter alleged to have been written by appellee's father to appellant as required by the

6. terms of the policy, notifying it of the sickness of the bull insured, because proper foundation for admission of documentary evidence had not been laid, no notice having been given appellant to produce the original as required by statute in the case of lost instruments. §502 Burns 1914, §479 R. S. 1881. It is not claimed that notice to produce was given. It is insisted by appellee that the evidence of appellant's agent in charge of its correspondence that no such letter was received by the company, was suffi-

7. cient to warrant parol proof. It is the law that mailing a letter properly addressed and stamped makes a *prima facie* case of delivery in due course of mail, which, if denied, presents a question of fact for determination by the court or jury trying the case. *Home Ins. Co. v. Marple, supra*. Notice to produce the letter in this case, in

6. view of the statement of appellant's agent, would have been a useless ceremony. The purpose of the statute is to require, if possible the production of the
8. original document, the best evidence. Giving the notice would not have had the effect of producing the document. No error was committed in the admission of this

evidence. 1 Wharton, Evidence (3d ed.) §§154, 161 and note; *Roberts v. Spencer* (1877), 123 Mass. 397.

In so far as the record in this case discloses, the case was fairly tried, and a correct result was reached. There are some suggestions and insinuations of fraud, but no

9. proof thereof. Three sections of our civil code prohibit a reversal of a judgment when it appears from the whole record that a correct result was reached. §§350, 407, 700 Burns 1914, §§345, 398, 658 R. S. 1881. In the case of *Vulcan Iron, etc., Co. v. Electric, etc., Min. Co.* (1913), 54 Ind. App. 28, 99 N. E. 429, this language is used by the court: "The court erred in giving this instruction to the jury, but we are again called upon to inquire whether the error was prejudicial to appellant", concluding that the error in the giving of the instruction was not prejudicial. So, in the present case, it appears that the insurance upon the animal was taken and paid for in the usual way; the cause and manner of the death was a question of fact for the jury about which there was little or no dispute, so far as the evidence discloses. No error was committed in overruling appellant's demurrer to the complaint. The errors are technical in character, and in the opinion of the court the substantial rights of appellant were not prejudiced. Judgment affirmed.

NOTE.—Reported in 106 N. E. 390. As to the general question of animal insurance, see 44 L. R. A. (N. S.) 569. See, also, under (1) 25 Cyc. 1521; (2) 38 Cyc. 1753; (4) 38 Cyc. 1782; (6) 17 Cyc. 558; (7) 16 Cyc. 1065, 1070; (9) 3 Cyc. 444.

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

LOUISVILLE AND SOUTHERN INDIANA TRACTION
COMPANY v. LOTTICH.

[No. 8,468. Filed November 24, 1914. Rehearing denied April 16, 1915. Transfer denied June 24, 1915.]

1. NEGLIGENCE.—*Trial.—Verdict.*—A general verdict for plaintiff in an action for personal injuries is a finding that defendant was guilty of negligence which was the proximate cause of the injury, and that plaintiff was free from contributory negligence. p. 430.
2. TRIAL.—*Verdict.—Answers to Interrogatories.*—Every reasonable presumption is indulged in favor of a general verdict as against a motion for judgment on the jury's answers to interrogatories, and the latter can only prevail when the answers are in irreconcilable conflict with the verdict, and to constitute such conflict it must be such as is impossible of removal by any possible evidence properly admissible under the issues. p. 430.
3. EVIDENCE.—*Judicial Notice.—Time of Sunset.*—The court takes judicial notice that on December 21, 1911, the sun set at 4:23 o'clock p. m. p. 431.
4. STREET RAILROADS.—*Personal Injuries.—Verdict.—Answers to Interrogatories.*—In an action against a street car company for injuries to a traveler upon the street, where the negligence charged was in the operation of the car at an unlawful speed so as to strike plaintiff's wagon as he was crossing the track, and the collision occurred after sunset, the general verdict for plaintiff is not overcome by answers to interrogatories showing that the track was in the center of a wide street, that at that point a car might be seen a distance of three blocks away, and that there were no obstructions to plaintiff's view, that plaintiff was experienced, and had good sight and hearing, and that the car could not have been stopped after he started to cross, etc., since under the issues evidence was admissible to show that it was too dark for plaintiff to see the car, that on account of noises he could not hear its approach, etc. pp. 431, 433.
5. STREET RAILROADS.—*Operation.—Drivers of Vehicles.—Respective Rights and Duties.*—The rights of the driver of a vehicle on the street and that of a street railway company are equal, and each is bound to use ordinary care to avoid a collision. p. 431.
6. STREET RAILROADS.—*Personal Injuries.—Contributory Negligence.—Jury Question.*—Where plaintiff, who was injured by defendant's street car, used some care when he undertook to cross defendant's tracks, it was a question of fact for the jury to determine whether such care was ordinary care under all the facts shown by the evidence. p. 431.

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

7. **STREET RAILROADS.—Operation.—Presumption as to Speed.**—The plaintiff, in attempting to drive across defendant's street car track had a right to assume that defendant's car would not be operated at an unlawful rate of speed, in the absence of any knowledge or warning to the contrary. p. 432.
8. **STREET RAILROADS.—Personal Injuries.—Contributory Negligence.—Determination.—Acts or Omissions of Company.**—The failure of a street car company in operating its cars to discharge the duty it owes to travelers rightfully on the streets is often an important element to be considered in determining the question of contributory negligence. p. 433.
9. **STREET RAILROADS.—Personal Injuries.—Jury Question.—Contributory Negligence.**—Where, in an action for injuries in being struck by a street car, the facts and conditions established were such as to warrant the drawing of different inferences by reasonable minds upon the question of contributory negligence, the question is one of fact for the jury to determine. p. 433.
10. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—In an action for personal injuries from collision with a street car, where a physician, in answer to a question asking him to state the extent of plaintiff's injury, testified that among other injuries the plaintiff had "an inguinal hernia on both sides", the action of the court in overruling a motion to strike out the quoted portion of the answer, on the ground that the complaint did not allege such injury, did not constitute harmful error, in the absence of any objection to the evidence upon the ground that defendant was not prepared to meet it, since the court could have ordered an amendment of the averments to permit such proof of hernia, and the court on appeal may treat such amendment as having been made. p. 434.
11. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—Where a lease was recorded in a "lease record" instead of in the miscellaneous records of the county, appellant was not harmed by its admission in evidence, where the proof did not relate to the real matter in controversy and the facts proven thereby were not disputed and were substantiated by other proof so far as material to any issue in the case. p. 436.
12. **APPEAL.—Review.—Instructions.**—The giving of an instruction to the effect that if the jury found that defendant was running its car in violation of a city speed ordinance it was guilty of negligence *per se*, but not stating that such negligence would entitle plaintiff to recover, was not objectionable in leaving out of consideration the question of proximate cause. p. 436.
13. **APPEAL.—Review.—Refusal of Instructions.**—In an action against a street railroad company for personal injuries, the refusal of an instruction that there is no evidence on which the

Louisville, etc., Traction Co. *v.* Lottich—59 Ind. App. 426.

doctrine of last clear chance can be based, was correct in view of evidence warranting the application of such doctrine, and, even if erroneously refused, the error was harmless in view of the fact that the jury did not find against appellant on the subject of last clear chance. p. 436.

14. *APPEAL—Review.—Refusal of Instructions.*—There was no error in the refusal of requested instructions, which, in so far as they correctly stated the law, were fully covered by others given. p. 437.

From Floyd Circuit Court; *William C. Utz*, Judge.

Action by Henry P. Lottich against the Louisville and Southern Indiana Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George H. Voigt and *George H. Hester*, for appellant.

Charles D. Kelso, for appellee.

FELT, J.—This is a suit for damages for personal injuries. The complaint is in one paragraph which was answered by a general denial. A trial by jury resulted in a verdict in favor of appellee for \$1,500. With its general verdict the jury returned answers to certain interrogatories. The court overruled appellant's motion for judgment on the answers to the interrogatories and its motion for a new trial. Judgment was rendered on the verdict. The ruling on each of said motions is called in question by the assignment of errors.

The complaint alleges in substance that on December 21, 1911, appellant, was and now is, an interurban street railroad company, organized under the laws of Indiana, engaged in operating street cars on and over its tracks on Main Street in the city of Albany; that on said day appellee was riding on the seat of a two-horse wagon and driving eastwardly on the south side of said street; that when he arrived at the intersection of lower Fifth and Main streets he turned from the south side of Main Street across the car tracks for the purpose of going north on lower Fifth Street; that when the rear end of the wagon had almost crossed over and cleared the tracks appellant carelessly and

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

negligently approached the wagon from the rear with one of its cars and recklessly, carelessly and negligently ran the car into and against the rear of said wagon, thereby knocking appellee off the seat and down on the doubletrees of the wagon; that by reason of such collision his horses became frightened and ran away and kicked appellee on the head; that as the car approached the crossing of said streets the same was not under the control of the motorman operating the same, but was carelessly and negligently run by the motorman at a high and excessive rate of speed, to wit, fifteen miles an hour in violation of an ordinance of said city, then in full force and effect, which prohibited the running of street cars in said city at a speed of over ten miles per hour; that the motorman, as he approached appellee's vehicle, was engaged in conversation with the conductor of the car and was not vigilantly watching ahead for the purpose of preventing accidents at the intersection of said streets; that as a result of the collision of the car with the wagon as aforesaid "plaintiff's head was battered, bruised and cut, his right side battered, bruised and injured; the right knee cap bruised and injured; the left knee and ankle bruised, cut, strained and twisted, and his back wrenched and strained."

Appellant contends that the court erred in overruling its motion for judgment on the answers to interrogatories notwithstanding the general verdict. By its answers to interrogatories, the jury in substance, found that on the day in question appellee was driving a two-horse team, in a trot, eastwardly along Main Street in the city of New Albany; that he drove along the south side of the street railway tracks located in the center of the street which was sixty feet wide and ran practically in a straight course; that the north wheels of the wagon were from two to eight feet from the south rail of the track; that as he reached the intersection of Fifth and Main streets, he drove across the track without stopping his team; that at the time appellee

was attempting to cross the track one of appellant's cars was approaching from the west; that the car was running at the rate of twelve miles per hour while approaching Fifth Street and when it struck the left hind wheel of the wagon; that when appellee started to cross the track the car was forty-five feet away; that the motorman attempted to stop the car as the wagon crossed the track; that appellee did not see the approaching car before his team started to cross the track nor before he crossed the track; that before he started across or when he crossed the track he did not know that a car was approaching Fifth Street; that there was nothing to obstruct the view of appellee down Main Street; that a person then and there seated on a wagon on such street could see an approaching street car three blocks away; that appellee was sitting on the front seat of the wagon; that there were no other vehicles in the street and nothing on the wagon to obstruct his view; that appellee was sixty-one years old and had good eyesight and good hearing; that he was experienced in driving horses and his team was gentle and he had it under control up to the time the car struck the wagon; that the accident occurred at 4:33 o'clock in the afternoon; that the car could not have been stopped between the time the horses started to go across the track and the time it struck appellee's wagon.

Appellant concedes that the answers show that its car which struck appellee's wagon was running at a speed prohibited by the ordinance, but it contends that they also conclusively show that appellee was guilty of negligence which contributed to his injury. The general verdict is a

1. finding that appellant was guilty of the negligence which was the proximate cause of appellee's injury and that he was free from negligence contributing thereto.

In determining the question on the motion for judgment on the answers to the interrogatories every reasonable

2. presumption is indulged in favor of the general verdict and judgment can only be given on the answers

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

to the interrogatories when they are in irreconcilable conflict therewith. If there is apparent conflict the judgment on the general verdict will prevail if the conflict between the answers and the general verdict may be removed by any possible evidence that might properly be given under the issues of the case.

The answers to the interrogatories show that the collision which resulted in the injuries complained of occurred at 4:33 o'clock in the afternoon of December 21, 1911.

3. This court will take judicial notice that on that day the sun set at 4:23 o'clock p.m. *Dayton, etc., Traction Co. v. Marshall* (1905), 36 Ind. App. 491, 76 N. E. 824; *Cincinnati, etc., R. Co. v. Worthington* (1903), 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478, 96 Am. St. 355.

4. It thus appears that the collision occurred after sunset. Evidence was admissible under the issues to show that it was cloudy and too dark for appellee to see the car, and that there were no artificial lights on the street. Also to show that on account of the noise of the wagon in which he was riding, or other noises, he was unable to hear the noise of the approaching car. Also that at some time before attempting to cross he did look to the rear for an approaching car and did not see it, nor learn that a car was approaching. Furthermore the findings which show that there were no obstructions to appellee's view were in response to questions which when reasonably construed must be held to have called the attention of the jury to obstructions of a physical nature and not to darkness.

Appellee's rights and those of appellant upon the street were equal and each was bound to use ordinary care to avoid a collision. Appellee was driving along the street

5. ahead of the car and the street and crossing where he attempted to pass over appellant's tracks were free from obstructions. He did not see nor hear the
6. car that struck his wagon or know of its approach when he drove across the tracks. In attempting to

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

cross over under such circumstances he may or may not have exercised the care of an ordinarily prudent man under similar conditions, but we can not declare as a matter of law that he was guilty of contributory negligence in attempting to cross the tracks as he did. Leaving out of consideration the possible evidence that might be admitted under the issues in aid of the general verdict as against the answers to the interrogatories, and giving full effect to the finding that a man situated and circumstanced as appellee was at the time he attempted to cross the tracks, could have seen a car three blocks away, still we can not declare as a matter of law that he was guilty of contributory negligence if he failed to ascertain that a car was approaching from the rear so near as to make it dangerous for him to attempt to cross the track. Likewise if he looked and saw the car and miscalculated its distance or the speed with which it was approaching. The findings do not conclusively show a failure on the part of appellee to use any care, but on the contrary show that he did exercise some care when he undertook to cross appellant's tracks. Where some care is exercised it is a question of fact for the jury to determine whether such care was ordinary care under all the facts shown by the evidence. *Cleveland, etc., R. Co. v. Nichols* (1913), 52 Ind. App. 349, 354, 99 N. E. 497. The car struck the rear wheel of appellee's wagon, which shows that he was almost over the track when the collision occurred. Appellee had the right to assume in the absence of any knowledge or warning to the contrary, that appellant's cars would not be operated at an unlawful rate of speed. *Lake Erie, etc., R. Co. v. Oland* (1912), 49 Ind. App. 494, 499, 97 N. E. 543. In *Indianapolis St. R. Co. v. Hoffman* (1907), 40 Ind. App. 508, 510, 82 N. E. 543, the court said: "There is no finding that appellee knew the speed of the approaching car, nor are facts found from which the conclusion irresistibly arises that he should have known it. The traveler upon a public

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

highway has a right to assume, within reasonable limits, that other persons using it will exercise reasonable care in so doing. Appellee cannot be considered as contributorily negligent for failing to anticipate the negligence of the defendant. *Indianapolis St. R. Co. v. Bolin* (1907), 39 Ind. App. 169 [78 N. E. 210]; *Union Traction Co. v. Vandercook* (1904), 32 Ind. App. 621 [69 N. E. 486]. If appellee had been struck by a car run in a careful and proper manner, his failure to see it and avoid it would deprive him of any right of action. Having been struck by a car run at a rapid and reckless rate, his failure to avoid it must be coupled with knowledge, actual or constructive, not only that the car was approaching along the track, but that it was running at a rate of speed which made it hazardous to cross, before the courts can say, as a matter of law, against a verdict, that he did not exercise reasonable care under the circumstances. Any other holding would put a premium on negligence by such companies, making that which is a basis of liability a sure avenue of escape from liability."

The failure of the railway company in operating its cars to discharge the duties it owes to travelers rightfully on the streets where it operates its cars, may be, and fre-

8. quently is an important element to be considered in determining the question of contributory negligence. *Virgin v. Lake Erie, etc., R. Co.* (1913), 55 Ind. App. 216, 101 N. E. 500; *Lake Erie, etc., R. Co. v. Oland, supra* 500; *Malott v. Hawkins* (1902), 159 Ind. 127, 135, 63 N. E. 308.

Considering the unlawful rate of speed of the car

9. which struck appellee's wagon and appellee's want of knowledge thereof in connection with all the other facts established by the answers to the interrogatories

4. we have a state of facts and conditions from which reasonable minds might draw different inferences as to whether in attempting to cross the tracks as he did appellee exercised ordinary care. Where such is the case neg-

ligence can not be declared as a matter of law and the question is one of fact to be determined by the jury from all the evidence in the case. The jury by its general verdict found in appellee's favor on the issue of his contributory negligence and the answers are not in irreconcilable conflict with such verdict. The court therefore did not err in overruling the motion for judgment on the answers to the interrogatories notwithstanding the general verdict.

As one of the causes for a new trial appellant assigns that "the court erred in overruling the motion of defendant to strike out the part of the answer of Dr. Chester C.

10. Funk, in which he stated that the plaintiff had an inguinal hernia." While Dr. Funk was testifying he was asked the following question: "Tell the jury what examination you made of him (plaintiff) and the extent of his injury in your own way?" The witness answered in substance that he saw appellee several days after he received his injury and that he had a scalp wound that had partially healed and "an inguinal hernia on both sides". After this answer the record shows the following: "The defendant, through its attorney, objects and moves the court to strike the answer from the record, that part which says, he found 'an inguinal hernia on both sides', for the reason, there is no allegation in the complaint that the plaintiff suffered from hernia as the result of the injury described in the complaint, or any allegation in the complaint that he suffered from any injury to the walls of the intestines, or any portion of the anatomy from which hernia can result, which objection and motion are by the court overruled, to which ruling of the court, the defendant, at the time excepts." Conceding without deciding that the form of the question did not indicate an answer that would amount to a variance between the averments of the complaint and the proof, and that for such reason the question may be raised by motion to strike out the objectionable part of the answer, still we do not find

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

that the court committed reversible error in overruling the motion to strike out part of the answer.

There was no objection on the ground that appellant was unprepared to meet the evidence. The court could very properly have ordered an amendment to make the averments broad enough to permit the proof of hernia if the averments were insufficient so to do. Where there is neither objection, nor proof, that the complaining party is unprepared to meet such evidence and the objection rests on the ground of variance, or that the averments of the complaint are insufficient to warrant the admission of such evidence, the trial court may order the pleading to be so amended as to admit the proof, and where that has not been done, on appeal, this court will consider the pleading so amended as to conform to the proof, where, as here, such amendment and proof do not relate to a new or different cause of action, or give any new right to a recovery separate and distinct from that already stated in the pleading so amended, or where amendment does not change the theory of the complaint or pleading amended, but simply permits proof of an additional phase of the injury resulting from the causes originally stated in the complaint. Such amendment does not add a new or different cause of action but simply permits proof within the issues, which the party may rebut. If he is not shown to have been unprepared to meet the proof and to have objected to the evidence on that ground, its admission is not harmful error. §§400-403, 700 Burns 1914, §§391-394, 658 R. S. 1881; *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489, 495, 73 N. E. 996; *Louisville, etc., R. Co. v. Hollerbach* (1886), 105 Ind. 137, 150, 5 N. E. 28; *Ohio, etc., R. Co. v. Selby* (1874), 47 Ind. 471, 497, 17 Am. Rep. 719; *City of Huntington v. Mendenhall* (1881), 73 Ind. 460, 463; *Louisville, etc., Traction Co. v. Lloyd* (1915), 58 Ind. App. 39, 105 N. E. 519; *Driscoll v. Penrod* (1911), 176 Ind. 19, 25, 95 N. E. 313; *Louisville, etc., R. Co. v. Shanks*

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

(1892), 132 Ind. 395, 396, 31 N. E. 1111; *Ohio, etc., R. Co. v. Hecht* (1888), 115 Ind. 443, 445, 17 N. E. 297; *Reddick v. Keesling* (1891), 129 Ind. 128, 133, 28 N. E. 316. See, also, *Lake Erie, etc., R. Co. v. Oland, supra*; *Lewark v. Carter* (1889), 117 Ind. 206, 211, 20 N. E. 119, 10 Am. St. 40; *Ashton v. Shepherd* (1889), 120 Ind. 69, 72, 22 N. E. 98.

Objection is also made to the admission in evidence of a lease from the New Albany Street Railway Company to appellant which was shown to have been recorded in

11. a "lease record" instead of the miscellaneous records of the county. The facts proven by the lease were not disputed and there was other proof of the same facts so far as material to any issue in the case. The proof did not relate to the real matters in controversy and it is quite apparent that if the book in which the lease was recorded was not in fact the record in which it should have been recorded appellant was in no way harmed by the evidence. *Houk v. Citizens Nat. Bank* (1912), 51 Ind. App. 628, 99 N. E. 437.

It is claimed that the court erred in giving instruction No. 6 requested by appellee, in that such instruction left out of consideration the question of proximate cause.

12. The instruction was to the effect that, if the jury found that appellant was running its car in violation of the city ordinance regulating the speed of cars, it was guilty of negligence *per se*. Appellant admits that the failure to perform a duty imposed either by statute or by an ordinance is negligence *per se*. This was the sum and substance of the instruction. It did not state that such fact would entitle appellee to recovery, and it was not open to the objection urged against it.

Instruction No. 11 tendered by appellant and refused is as follows: "There is no evidence in this case upon which

the doctrine of last clear chance can be based and if
13. you find that the plaintiff was guilty of contributory negligence your verdict must be for the defendant."

Louisville, etc., Traction Co. v. Lottich—59 Ind. App. 426.

There was some evidence admitted tending to show that appellee was in a position of imminent peril on appellant's track and that the motorman in charge of appellant's car saw appellee and the danger to which he was exposed some time before the collision, and that by the exercise of reasonable care he could have slackened the speed of the car in time to have avoided the collision and that the motorman failed to do so. Under such evidence it was not error to refuse the instruction tendered. Furthermore the answers to the interrogatories show that the jury did not find against appellant on the theory of last clear chance, and therefore if the instruction should have been given, its refusal in such case was not harmful to appellant.

Appellant also contends that the court erred in refusing to give to the jury instructions Nos. 15 and 19 tendered by it. These instructions deal with the duty of a person 14. about to cross a street car track and the duty and rights of a motorman operating a car propelled by electricity. The court gave many instructions requested by both appellant and appellee and in so far as the instructions refused state correct propositions of law applicable to the issues and evidence of the case they were fully covered by the instructions given. We find no available error in the record. Judgment affirmed.

NOTE.—Reported in 106 N. E. 903. As to injuries by street car collisions with vehicles or horses, see 25 L. R. A. 508. See, also, under (1) 38 Cyc. 1915 Anno. 1962-new; (2) 38 Cyc. 1927; (3) 16 Cyc. 857; (4) 36 Cyc. 1646; (5) 36 Cyc. 1495; (6) 36 Cyc. 1628; (7) 36 Cyc. 1550; (8) 36 Cyc. 1527; (9) 36 Cyc. 1622; (10) 31 Cyc. 703; 3 Cyc. 291; (11) 38 Cyc. 1411, 1419; (12) 36 Cyc. 1638; 38 Cyc. 1627; (13) 36 Cyc. 1638; 38 Cyc. 1627, 1817; (14) 38 Cyc. 1711.

. SMITH ET AL. v. HIBBEN ET AL

[No. 8,847. Filed December 9, 1914. Rehearing denied May 5, 1915.]

Transfer denied June 24, 1915.]

1. **APPEAL.—Extension of Time for Briefs.—Subsequent Filing of Motion to Dismiss.—Right to Consideration of Motion.**—Although Rule 21½ requires that a petition for extension of time to file briefs must show that all motions to dismiss and all dilatory motions on behalf of the petitioner have been filed, a party procuring an extension thereunder is not necessarily deprived of the right to subsequently move for a dismissal of the appeal, especially where it appears from the petition on which the extension was granted that petitioner did not intend to waive the right to move to dismiss the appeal if cause for dismissal should thereafter be discovered, or where it appears on the facts of the case that the same result would follow independently of the action of the court in granting the extension of time. p. 441.
2. **APPEAL.—Notice.—Record.—Conclusiveness.**—Where it appears from the precept and also from the clerk's certificate to the transcript that the notices of appeal, which appellant contends bear the file mark of the clerk of the court on appeal in compliance with §674 Burns 1914, Acts 1899 p. 5, were placed on file in the office of the clerk of the trial court, the record is conclusive, and such notices can not be considered as original notices filed only in the office of the clerk of the Appellate Court. p. 442.
3. **APPEAL.—Imperfect Term Time Appeal.—Failure to Perfect Vacation Appeal.**—Where the record discloses that appellants undertook to perfect a term time appeal, which was later abandoned, and it appears that the judgment was a joint judgment against joint defendants, one of whom was a nonresident who was defaulted and took no steps to appeal, and notice of appeal was served below upon such codefendant, and upon the appellees, but that the transcript was not filed within sixty days from the time of giving such notice, the notice was unavailable for the perfection of a vacation appeal. p. 443.
4. **APPEAL.—Notice to Coparties.—Statutes.**—Provision for notice to coparties in vacation appeals, where all the parties affected by the judgment do not join in the appeal, is made only in §674 Burns 1914, Acts 1899 p. 5, and, in such appeal notice must be served on the coparties not joining and the proof thereof must be filed in the office of the clerk of the court to which the appeal is taken. p. 445.
5. **APPEAL.—Ineffectual Notice.—Failure to Perfect Notice.—Dismissal.**—Under Rule 36 of the Supreme and Appellate Courts, a

dismissal of an appeal is required where the cause has been on the docket ninety days or more, and there has been no appearance by appellee and no steps have been taken to bring him into court, or where notice given was ineffectual and no steps have been taken for more than ninety days after issuance thereof to bring appellee into court; hence where an appeal, in which the notice to coparties and to appellees was ineffectual, had remained upon the docket without any subsequent steps to procure service of proper notice, appellees were not precluded from urging a dismissal after submission and after procuring an extension of time for filing briefs, since appellants were not entitled to a submission, and the defect in service of notice on the coparty was one which is not waived by failure to move for dismissal until after submission and the filing of briefs. p.446.

6. *APPEAL.—Jurisdiction.—Notice to Coparties.*—In order to confer jurisdiction in a vacation appeal all coparties to the judgment must be joined as appellants and be duly notified, or the court acquires no jurisdiction to determine the case on its merits, and must dismiss the appeal. p.447.

7. *APPEAL.—Failure to Perfect as to Coparty.—Dismissal.*—Where the notice to a coparty was defective and the cause remained upon the docket beyond the time allowed without any steps to perfect the appeal as to such coparty, jurisdiction could not be conferred by dismissal of the appeal as to such coparty on his motion setting up that he had no desire to join therein, since where an appeal is not perfected within the time allowed by statute, no steps can thereafter be taken that will confer jurisdiction. p.447.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action by Harold B. Hibben and others against John H. Smith and others. From a judgment for plaintiffs, the defendants appeal. *Appeal dismissed.*

W. A. Thompson, R. W. Sprague and Kane & Kane, for appellants.

W. A. Ketcham, Merrill Moores and Walter Fertig, for appellees.

FELT, J.—The appellees, Harold B. Hibben, Thomas E. Hibben, and Louis Hollweg, have entered a special appearance herein and moved to dismiss the appeal on the ground that this court has not acquired jurisdiction of the appeal. The substance of the motion is as follows: That the suit was

a joint action against appellants, John H. Smith and Beecher W. Bennett, and one George C. Benham, and the judgment in favor of appellees was a joint judgment against all three of the defendants; that Benham did not appeal and no notice of the appeal was served on him by appellants, Smith and Bennett, and filed with the clerk of this court as required by the statute; the judgment below was rendered against said Benham by default and no copy of the summons issued against him is contained in the transcript though the record shows that such summons was issued; that said Benham did not appear to the action; that an attempt was made to take a term time appeal and the same was abandoned; that final judgment was rendered on January 17, 1913, at which time eighty days' time was given in which to file an appeal bond; that the bond was filed on April 5, 1913, within the time allowed; that the transcript was not filed in this court within sixty days thereafter, nor until January 7, 1914. It is further alleged that the appeal was not perfected as a vacation appeal; that no notice of such appeal was served upon appellees nor on their codefendant, Benham, as required by Rule 2 of this court and by §§681, 674 Burns 1914, §640 R. S. 1881, Acts 1899 p. 5; that a notice to a coparty of a vacation appeal, filed with the clerk of the lower court is insufficient; that the notices embodied in the transcript are not entitled to consideration, but if considered, they are insufficient to confer jurisdiction on this court for the reason they purport to have been served on the eighth, eleventh and twelfth days of July, 1913, and the transcript was not filed within sixty days from such dates; that the cause having stood on the docket of this court for more than ninety days, and there being no appearance of the parties to the appeal and no notice of the appeal as required by the statute, and no steps having been taken by appellants to bring the necessary parties to the appeal into court, jurisdiction of the appeal has not been acquired and the same should be dismissed.

Preliminary to a consideration of the merits of the motion to dismiss, we must determine whether appellees have waived their right to present and secure action on such motion.

1. On May 2, 1913, appellees filed an application for an extension of time in which to file their briefs, and were given until October 20, 1914. They did not strictly comply with the rules of this court by showing that all motions to dismiss and all dilatory motions on their behalf had been filed, but in excuse for not so doing they showed that the record was voluminous (946 pages) and had been in appellant's possession until April 6, 1914; that on account of its length and the press of business appellees' counsel had been unable to examine the same; that they were not then aware of any grounds for a motion to dismiss or other dilatory plea and, as then advised, expected to brief the case on its merits. On October 9, and within the time granted for filing their briefs, appellees filed their motion to dismiss. Rule 21½ of this court is as follows: "Petitions for extensions of time to file briefs will not hereafter be granted, unless facts are stated therein showing that the court in which said case is pending has jurisdiction thereof, and it is shown that such brief will be on the merits of the cause and that all motions to dismiss and all dilatory motions in said cause on behalf of the petitioner have been filed. The application must also show the date of submission of the cause, the date upon which the time of the applicant for filing the briefs will expire, and the order of the court will fix the date on or before which the brief shall be filed." Under this rule, the fact that a party procures an extension of time in which to file his briefs, does not necessarily deprive him of the right to move to dismiss the appeal, though the rule does make the showing in regard to such motions a condition precedent to the procurement of an extension of time. Appellees in their application for an extension of time clearly show that they did not intend to waive their right to move to dismiss the appeal if they afterwards

discovered facts warranting such motion. Whether the court either rightly, inadvertently or erroneously granted appellees an extension of time on a petition that did not fully comply with the rules of the court, does not change the fact that the time for filing briefs was extended without a statement in the petition that all motions to dismiss and other dilatory pleas had been filed. By obtaining an extension of time on such petition, appellees did not waive their right to present and have considered a motion to dismiss the appeal. Furthermore, on the facts of this case, as will further appear, the same result would follow independently of the action of the court in granting the extension of time to appellees.

Appellants do not contend that they gave any other, or different notice of the appeal than those served in July, 1913, and brought up as a part of the transcript.

2. They assert, however, that though the notices are bound with the record, it does not appear that they were filed with the clerk of the lower court, and claim that the file mark of the clerk of this court placed thereon the day the record was filed, was in compliance with §674 Burns 1914, *supra*, and that the notices are sufficient to give this court jurisdiction. Appellants admit that the praecipe calls for copies of the original notices, but contend that the absence from the notices copied into the record, of the file mark of the clerk of the lower court, shows that they are the originals, and not copies, and that this court should consider them as original notices filed only in the office of the clerk of this court. We are unable to agree with such conclusions. However, the record is conclusive on the subject and leaves no room for doubt so far as this court is concerned.

The precipe expressly calls for "Notice of appeal to Clerk. Notice of appeal to parties plaintiff, Harold B. Hibben, et al; notice to coparty, George C. Benham", and the clerk certifies that the "transcript contains true, full, exact, and complete copies of the papers, * * * notices, serv-

ices of notices, acknowledgment of service of notices, * * * all of which said above enumerated papers are on file in my office as clerk of said court", and in addition thereto the clerk embodies in and makes a part of his certificate, in full, the "Special precipe for transcript; notice to clerk of appeal; notice of appeal to coparty, George C. Benham * * * and the entry of the record of filing the same in the clerk's office, as the same above enumerated and described papers * * * were severally filed in the office of said clerk, and as appears in my office as such clerk." From the foregoing it not only appears that the notices of appeal were placed on file in the office of the clerk of the lower court, were called for by appellants' precipe and certified up as copies of originals on file, and made a part of the transcript, but that appellants, employed not only the usual, but resorted to unusual, means to have the notices so appear by having the clerk in addition to the usual certificate, embody in and make a part of his certificate the special precipe calling for such notices.

The record also shows that after the court had granted 120 days to appellants in which to prepare and file their bill of exceptions, they applied for and obtained an

3. extension of sixty days' time from May 17, 1913, for that purpose, which extended the time into July, the month in which the notices of appeal were served. On July 5, 1913, the bill of exceptions was presented to the judge, duly signed and made a part of the record, but the transcription was not filed in this court until January 7, 1914. From the foregoing, it is apparent that the original plan of appellants was to take a term time appeal and that later on this idea was abandoned and they undertook to perfect a vacation appeal. Section 681 Burns 1914, *supra*, provides two ways of giving notice of such appeal, to the adverse party, but makes no provision for notice to a coparty, where all parties against whom the judgment was rendered do not join in the appeal. *Tate v. Hamlin* (1895), 149 Ind. 94, 97, 99, 41 N.

E. 356, 1035. Section 674 Burns 1914, *supra*, provides that: "A part of several coparties may appeal to the supreme or appellate court, but in such case they must serve written notice of the appeal upon all the other coparties or their attorneys of record, and file proof thereof with the clerk of such court, and whenever it shall be made to appear to such court by satisfactory proof that such other coparties or any of them, are not residents of the state and have no attorneys of record in the court below, or that such attorneys can not be served with such notice in the state, the court may order that notice of the pendency of the appeal be given to such non-resident co-parties in some newspaper printed and published in the state, for three weeks successively; after which, if proper notice has been given the appellees, the court shall proceed in all respects as if said nonresident coparties had been personally served with notice of said appeal."

The record shows, and all the parties concede, that a joint judgment was rendered against appellants and George C. Benham; that Benham did not appear either in person or by attorney; that he was defaulted and never at any time took any steps to appeal from said judgment nor did he authorize anyone so to do. It also appears from the record that at the time the notice of appeal was served on Benham in July, 1913, he was a resident of Cuyahoga County, Ohio. Rule 2 of this court provides: "When an appeal is taken and notice is given below, the transcript must be filed in the clerk's office within sixty days from the time of giving such notice; if the transcript is not so filed, the notice shall be without effect." This rule has been sustained by the decisions of the Supreme Court and of this court, and it has been held that it neither abridges nor extends the time within which an appeal may be taken as provided by statute, but places a reasonable limitation, in harmony with our statutory provisions, on the time during which a notice of appeal "given below", remains effective for the purpose of perfecting the appeal. If notice of the appeal has been served

below on the adverse party or his attorney and the transcript has not been filed in this court within sixty days thereafter, the notice ceases to be effective to perfect the appeal, but the party may nevertheless serve another notice and perfect his appeal within the time authorized by the statute. *Johnson v. Stephenson* (1886), 104 Ind. 368, 4 N. E. 46; *Doak v. Root & McBride Co.* (1901), 26 Ind. App. 138, 58 N. E. 444; *Ewbank's Manual* §154. The notices served in July were of no avail to perfect the appeal as to the adverse parties on the transcript filed in January following, for after sixty days the notice so served became ineffective and the appeal, in legal contemplation, was abandoned.

The questions presented by the motion to dismiss relate not only to the adverse parties below, the appellees here, but to Benham, the coparty, who did not join in the

4. appeal. Section 674 Burns 1914, *supra*, is the only section which provides for notice to coparties in vacation appeals where all the parties affected by the judgment do not join in the appeal. *Jones v. McGinnis* (1915), 58 Ind. App. 124, 103 N. E. 353; *Holloran v. Midland R. Co.* (1891), 129 Ind. 274, 275, 28 N. E. 549; *Abshire v. Williamson* (1898), 149 Ind. 248, 252, 48 N. E. 1027; *Michigan Mut. Life Ins. Co. v. Frankel* (1898), 151 Ind. 534, 538, 50 N. E. 304; *Masconi v. Hert* (1913), 52 Ind. App. 345, 100 N. E. 781. A part of several coparties may appeal to the Supreme or Appellate Court, but where it is a vacation appeal, as in the case at bar, the party or parties so appealing must serve a written notice of the appeal on all the coparties not joining in the appeal, and file proof thereof with the clerk of the court to which the appeal is taken, and it is not a sufficient compliance with the statute to file proof thereof with the clerk of the lower court from which the appeal is taken. §674 Burns 1914, Acts 1899 p. 5. *Helberg v. Dovenmuehle* (1906), 37 Ind. App. 377, 379, 76 N. E. 1020; *Sohl v. Evans* (1902), 29 Ind. App. 634, 62 N. E. 84; *Brown*

v. *Brown* (1907), 168 Ind. 654, 655, 80 N. E. 535; *National Surety Co. v. Button* (1908), 41 Ind. App. 301, 304, 83 N. E. 644.

As already shown the transcript in this case was filed on January 7, 1914. When the transcript was filed the notice of the appeal given in July, 1913, was of no avail to notify the adverse parties of the appeal, for the reason that such notice expired, or became ineffective under Rule 2, *supra*, at the expiration of sixty days from April 5, 1913, and for the further reason, as applied to Benham, that the notice served upon him under §674, *supra*, to be effective, should have been filed with the clerk of this court.

Rule 36 of this court provides: "Where a cause appealed in vacation has been on the docket ninety days or more, and

there is no appearance by the appellee, and no steps

5. have been taken to bring him into court; or where a notice has been issued and proven ineffectual from any cause, and no steps are taken for more than ninety days after the issuance of such ineffectual notice to bring the appellee into court, the clerk shall enter an order dismissing the appeal." Since the filing of the transcript appellants have taken no steps to give notice of the appeal to anyone. Appellees took no steps relating to the appeal in any way until May 2, 1914, when they applied for additional time, as above shown. This was more than ninety days after the cause was docketed in this court, and after the time, when under the rule, the appeal should have been dismissed. Appellants were not entitled to an entry of submission, had the notice, the time of service, the fact that Benham was a coparty, and the filing of the notice below as to him, been brought to the attention of the clerk. Where the appeal should have been dismissed, and was not, the court will order the dismissal when its attention is called to the facts which authorize the dismissal. *Cole v. Franks* (1897), 147 Ind. 281, 284, 46 N. E. 532. The fact that the appellees did not move to dismiss the appeal until after the entry of submis-

sion, nor until they had applied for and obtained an extension of time, under the circumstances already shown, does not preclude their right to urge a dismissal of the appeal, for it has been held that in vacation appeals taken by a part of several coparties, the statutory requirements of service of notice of the appeal upon coparties not joining therein is imperative, jurisdictional and not waived by the failure to move to dismiss the appeal until after the submission of the cause and the filing of briefs on the merits of the

6. appeal. Also that before any court will proceed to adjudicate upon the subject-matter, it must first acquire jurisdiction over all the parties whose rights or interests will be necessarily affected by its judgment; that in a vacation appeal under §674, *supra*, in order to bring the appeal within the jurisdiction of this court all coparties to the judgment, or judgment defendants, must be joined as appellants and be duly notified, or the court acquires "no jurisdiction to determine the case on its merits, and the appeal must be dismissed on the motion of a party or by the court of its own motion." *Continental Ins. Co. v. Gue* (1912), 51 Ind. App. 232, 98 N. E. 147, and cases cited; *Cole v. Franks, supra*; *Sohl v. Evans, supra*; *Holloran v. Midland R. Co., supra*; *Michigan Mut. Life Ins. Co. v. Frankel, supra* 539; *Hutts v. Martin* (1892), 131 Ind. 1, 30 N. E. 698, 31 Am. St. 412; *Abshire v. Williamson, supra*; *Ashley v. Henderson* (1904), 32 Ind. App. 242, 243, 69 N. E. 469; *Doak v. Root & McBride Co., supra* 141; *Tate v. Hamlin, supra* 101; *O'Mara v. Wabash R. Co.* (1898), 150 Ind. 648, 50 N. E. 821; *National Surety Co. v. Button, supra* 304.

On October 15, 1914, since the filing by appellees of their motion to dismiss the appeal, said Benham filed a motion in which he states in substance that at the time of the

7. rendition of the judgment he was, and now is, a non-resident of the State of Indiana; that he never authorized an appeal in this case and had no knowledge of any appeal except that given by the notice of July 8, 1913, until

he was informed thereof on October 15, 1914; that he never at any time desired to join in or to assign error in said appeal, and now asks the court to strike his name from the assignment of errors and to dismiss the appeal as to him. Appellants insist that this court should sustain said motion; that appellees entered a full appearance to the appeal by asking for and obtaining an extension of time and that with the name of Benham, their coparty, stricken from the assignment of errors and the appeal dismissed as to him, the court has jurisdiction to dispose of the appeal on its merits. Had Benham been duly notified within the time for perfecting an appeal this would be true.

This court has frequently held that where a party has failed to perfect his appeal within the time allowed by statute, he may not thereafter change or amend his assignment of errors, or take any other steps to give the court jurisdiction it did not acquire within the time given by the statute in which to perfect an appeal. *Pope v. Voigt* (1912), 49 Ind. App. 176, 96 N. E. 984; *Tate v. Hamlin*, *supra* 98; *Brown v. Brown*, *supra* 655.

This case stands on the docket the same as if no attempt to give notice of the appeal had ever been made. The court did not have or acquire jurisdiction of the appeal within the year allowed by the statute to take an appeal. No steps were taken by appellants to perfect the appeal within the meaning of our statutes and the rules of the court as interpreted by many decisions of both the courts of last resort in this State. The case comes within the provisions of Rule 36 and the appeal must therefore be dismissed.

The other suggestions and motions do not affect the determination of the motion to dismiss the appeal. We have treated the precipe as signed and the transcript as showing the summons and service thereof on Benham as a part of the record, since the facts shown by the record and the statements of counsel in their briefs leave no room for doubt as to the correctness of such conclusions. There is no need

therefore of action on appellant's application for a writ of *certiorari* to make the record show the summons and the signing of the precipe. Action on Benham's motion to dismiss could not change the conclusion reached, since the appeal, for the reasons already stated, must be dismissed. Appeal dismissed.

NOTE.—Reported in 107 N. E. 40. See, also, under (1) 3 Cyc. 191; (2) 3 Cyc. 152; (4) 3 C. J. 1221; 2 Cyc. 864; (5) 3 C. J. 1238; 3 Cyc. 1913 Anno. 188-new; 3 Cyc. 190, 194; (6) 3 C. J. 1005, 1221; 2 Cyc. 757, 864; (7) 3 C. J. 1043, 1238; 2 Cyc. 785; 3 Cyc. 1913 Anno. 188-new.

DEETER, ADMINISTRATOR, v. BURK.

[No. 8,864. Filed December 22, 1914. Rehearing denied April 22, 1915. Transfer denied June 24, 1915.]

1. **APPEAL.—Presenting Questions for Review.—Peremptory Instructions.**—Error in the giving or refusing of a peremptory instruction can not be presented by independent assignment of error, but is ground for a new trial. p. 453.
2. **EXECUTORS AND ADMINISTRATORS.—Claims Against Estates.—Defenses.—Non Est Factum.**—In the trial of claims against decedent's estates, all defenses except set-off or counterclaims are available under §2842 Burns 1914, Acts 1883 p. 156, without being pleaded, so that in an action on a note against the estate of a decedent the defense of *non est factum*, though not pleaded, was available and placed upon claimant the burden of proving its execution. p. 454.
3. **APPEAL.—Review.—Issues.—Burden of Proof.—Peremptory Instructions.**—In an action against the estate of a decedent upon a promissory note, the contention of appellant that, since the defense of *non est factum* placed on plaintiff the burden of proof on the question of execution and the evidence in support of such execution, though uncontradicted, was verbal, it was error for the court at plaintiff's request to peremptorily instruct the jury for plaintiff, on the ground that it deprived defendant of the right to have the credibility of the witnesses and the weight of their testimony determined by the jury, can not prevail in view of the fact that defendant first asked for a peremptory instruction, thereby inviting the action of the court, to which he at no time

objected on the ground that he was entitled to have any question of fact submitted to the jury. p. 454.

4. **BILLS AND NOTES.—Execution.—Evidence.**—Where the execution of a promissory note is in issue, no presumptions are indulged in its favor and the burden of proof is upon the party seeking to recover, but a *prima facie* case of execution is made by proof of the signing of the note together with the possession of the note by the payee or his attorney and its introduction in evidence. pp. 456, 457, 459.
5. **EXECUTORS AND ADMINISTRATORS.—Claims Against Estates.—Action on Note.—Proof of Execution.**—The rule as to the proof necessary to create a *prima facie* case of the execution of a note to which the defense of *non est factum* is interposed, is the same whether the payor be living or dead at the time of the action, and regardless of whether the action is by way of claim against the estate of the payor or by complaint against him; §2842 Burns 1914, Acts 1883 p. 156, having no other effect in the trial of a claim against the estate, than to permit the defense of *non est factum* to be interposed without being pleaded. p. 457.
6. **BILLS AND NOTES.—Delivery.—Evidence.—Possession by Payee.**—Possession of a note in the hands of a payee in and of itself imports either an actual or constructive delivery by the payor to him, or at least imports that the payee's possession is with the knowledge and consent of the payor, and gives rise to the presumption in favor of that inference which imports good faith and right conduct. p. 459.
7. **BILLS AND NOTES.—Delivery.—Evidence of Possession.**—Proof of possession by the payee of a note at the time of trial is sufficient to make a *prima facie* case of delivery at the date of its execution, or at least, within the lifetime of the payor. p. 459.
8. **BILLS AND NOTES.—Form.—Consideration.—Evidence.**—A promissory note, though not negotiable under the law merchant, and not containing the words "for value received", is negotiable by virtue of §9071 Burns 1914, §5501 R. S. 1881, and imports a consideration, so that the evidence will support a verdict for plaintiff in an action thereon without any evidence as to consideration other than the instrument itself. p. 460.
9. **BILLS AND NOTES.—Negotiability.—"Value Received".**—The words "value received" are not essential to the negotiability of a note, unless they are required by statute. p. 460.

From Montgomery Circuit Court; Jere West, Judge.

Action by Clyde D. Burk on a claim against the estate of Elizabeth Deeter, deceased. From a judgment for plaintiff, the administrator of said estate appeals. *Affirmed.*

Deeter v. Burk—59 Ind. App. 449.

Clyde H. Jones, M. W. Bruner and Charles R. Milford
for appellant.

Thomas & Foley, for appellee.

HOTTEL, C. J.—This action is based on the following claim filed with the clerk of the Montgomery Circuit Court on August 1, 1912:

“Estate of Elizabeth Deeter, Deceased. In account with Clyde D. Burk, Dr. (Duplicate) October 4th, 1909. \$1000.00. Six months after death I promise to pay Clyde D. Burk from my estate and through my administrator one thousand dollars, 6 per cent. interest from maturity. Signed, Elizabeth Deeter. State of Indiana, Montgomery County, ss: I, M. S. Deeter do solemnly swear that the above claim for \$1000.00 and interest is justly due and owing to Clyde D. Burk from the estate of Elizabeth Deeter deceased, and remains wholly unpaid; that there are no legal set offs against the same, as the affiant verily believes, and further says not. M. S. Deeter. Subscribed and sworn to before me this 3rd day of Aug. 1912. Edgar A. Rice, Clerk.”

This claim, not being allowed by the administrator, was transferred to the trial docket of the circuit court of said county, where, without further pleadings being filed in the case, it was submitted to a jury for trial. The entire evidence and proceedings at the trial, as disclosed by the transcript, are in substance as follows: Michael S. Deeter, a witness for the claimant, testified that he was a brother of decedent and was acquainted with her handwriting. The claimant's attorney then placed in the hands of the witness the note, a copy of which is set out above in the claim, and asked the witness, whether he saw decedent write her signature thereto and the witness answered, “Yes. I did. She wrote it in my presence” on October 4. On cross-examination the witness stated again that he saw “decedent sign her name” to the note; that at the time she signed it, he (witness) and decedent were alone in the sitting room of decedent's home; that possibly one of his daughters might have been about the premises, but if so she was out at the

time. Allen M. Deeter, a witness for claimant, testified that he was a brother of decedent, and acquainted with her signature, and after examining the note said that the name signed thereto was the signature of decedent. The note was then offered in evidence, and to its introduction the appellant objected on the ground that it had "not been shown to have been properly executed". This objection was overruled and the note was read in evidence, whereupon appellee rested his case.

The appellant then moved the court to instruct the jury to return a verdict in his favor "for the reason that plaintiff had not introduced sufficient evidence to make a *prima facie* case". This motion was overruled and the defendant rested. Appellee then recalled Allen M. Deeter for further examination, whereupon the appellant objected to appellee offering any further evidence after both he and the appellant had rested their case. This objection was overruled and the witness testified that his sister, the decedent, died February 16, 1912. Thereupon appellee again rested his case, and (we copy from appellant's bill of exceptions No. 2, set out in the record) "the defendant announced to the court that he had no evidence he desired to introduce and thereupon made a motion that the court instruct the jury to find for the defendant, which motion was an oral motion and was in the words following: 'The defendant moves the court to instruct the jury to find for the defendant' and the court thereupon overruled said motion so made by the defendant and refused to instruct the jury to find for the defendant, to which ruling of the court and its refusal to so instruct the defendant at the time excepted, and thereupon the court announced to the plaintiff that it would instruct the jury to find for the plaintiff, if the plaintiff so desired, and thereupon the attorneys for the plaintiff announced to the court, 'We do desire the court to so instruct the jury', and thereupon the court instructed the jury to find for the plaintiff, which instruction was as follows: 'Gentlemen of the jury,

in this case you will find for the plaintiff in the sum of one thousand dollars, with interest on the same at six per cent per annum from the 16th day of August, 1912.' To which action of the court in so instructing the jury to find for the plaintiff the defendant at the time objected and excepted." A motion for new trial filed by appellant was overruled and judgment rendered on the verdict. From this judgment appellant appeals and assigns as error each of the rulings of the court above indicated on the respective motions of appellant and appellee for a peremptory instruction, and also, the ruling on the motion for a new trial.

Any error in giving or refusing to give a peremptory instruction is ground for new trial and hence is not ground for an independent assignment of error. *Bane v.*

1. *Keefer* (1899), 152 Ind. 544, 53 N. E. 834; *United States, etc., Ins. Co. v. Batt* (1912), 49 Ind. App. 277, 281, 97 N. E. 195; *Chicago, etc., R. Co. v. Richards* (1901), 28 Ind. App. 46, 59, 61 N. E. 18. However, each of the rulings on said respective motions of the parties for a peremptory instruction, as well as all other rulings during the progress of the trial, above indicated, were properly excepted to at the time and were properly presented to the trial court for review by appellant as grounds of his motion for new trial. Such motion, in addition to such grounds, contained the further grounds that the verdict is not sustained by sufficient evidence and is contrary to law. Most, if not all, of the grounds of this motion relied on for reversal, in their last analysis, present the same question, viz., Did the trial court err in peremptorily instructing the jury to return a verdict for appellee? It should be remarked, however, that the disposition of this question involves the consideration of the question of the sufficiency of the evidence to sustain the verdict. However, before we reach the latter question, we must first determine whether, in view of the issues presented, the action of the trial court, under any view of the evidence introduced, can be upheld.

Deeter v. Burk—59 Ind. App. 449.

In cases of claims against decedents' estates, where, as in this case, no pleadings are filed by the administrator, the statute puts in all defenses except that of set-off and

2. counterclaim. §2842 Burns 1914, Acts 1883 p. 156; *Schele v. Wagner* (1904), 163 Ind. 20, 24, 25, 71 N. E. 127, and cases cited; *Digan v. Mandel* (1907), 167 Ind. 586, 594, 79 N. E. 899, 119 Am. St. 515, and cases cited.

It follows that in the instant case the defense of "*non est factum*" was in by virtue of such statute, and this defense put on appellee the burden of proving the execution of the note. It is contended by appellant that, in view of

3. the fact that this burden was on appellee and that the evidence in support of such execution was in fact, and of necessity, verbal, that a peremptory instruction could in no event be proper or justified under the decisions of both this and the Supreme Court. This court had occasion to consider this question in the recent case of *Lyons v. City of New Albany* (1913), 54 Ind. App. 416, 103 N. E. 20, and we there collected and cited the authorities that seemingly support appellant's contention as well as some of those which indicate that a peremptory instruction is proper and may be given in favor of the party having the burden of proof where the evidence, whether oral or documentary, is of such a character as to permit but one inference to be drawn therefrom, such inference being in favor of the person on whom rests the burden of proof. See also, *Collins v. Catholic Order, etc.* (1909), 43 Ind. App. 549, 88 N. E. 87; *Baker v. Bundy* (1913), 55 Ind. App. 272, 103 N. E. 668, and cases cited.

The cases above cited on which appellant relies proceed on the theory that the Constitution gives to the litigants in cases triable by jury the right to have the credibility of the witnesses and the weight to be given their testimony, determined by a jury, and hence that the court can not take away that right and itself exercise it in favor of the party on whom rests the burden of proof. However, in the instant

case we do not feel that we are required to determine whether the law is as appellant contends on this subject, because, we think, he is in no position to assert that the trial court deprived him of the right to a trial of his case by jury. The trial court did not give such peremptory instruction until it had been asked by each party to give such an instruction in his favor. The appellant first asked such an instruction, thereby expressly inviting and, indeed, asking the court in effect to take the case from the jury and decide it itself. This was the effect, and the only effect, his request could have, and, when appellee also indicated a similar desire and request in his favor, the court gave the instruction complained of by appellant. Under such circumstances both parties, thinking no doubt that the question to be determined was one of law rather than of fact, in effect, indicated to the court a desire to have it, rather than the jury, determine the case. Appellant at no time withdrew his request for an instruction in his favor, nor did he, after appellee had indicated a desire for an instruction in his (appellee's) favor, offer any objection on the ground that he desired to have, or was entitled to have, any question of fact submitted to the jury, nor did he, at any time after both he and appellee had respectively requested a peremptory instruction, ask or demand of the court that the decision of the case be submitted to the jury for trial. It follows that both parties to the litigation, in effect, placed themselves in the same situation they would have been had they, in the first instance, submitted the case to the court for trial, and the instruction of the court, together with the verdict of the jury returned thereunder, were, in effect, the decision of the court, with all the presumptions in its favor that would have existed in favor of the verdict returned by the jury in the regular way, or the decision of the court, had the cause been submitted to it for trial in the first instance.

Our attention has been called to no case in either of the courts of appeal of this State, and we have been unable to

find any case in such courts, where the question under consideration was presented or decided; but, we find ample authority in other jurisdictions for our conclusion. *Adams v. Roscoe Lumber Co.* (1899), 159 N. Y. 176, 180, 53 N. E. 805; *United States v. Two Baskets* (1913), 205 Fed. 37, 38, 123 C. C. A. 310; *Murch Bros. Constr. Co. v. Johnson* (1913), 203 Fed. 1, 121 C. C. A. 353; *Sundling v. Willey* (1905), 19 S. Dak. 293, 296, 103 N. W. 38, 9 Ann. Cas. 644; *Beuttell v. Magone* (1895), 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654; *Thompson v. Simpson* (1891), 128 N. Y. 270, 28 N. E. 627; *Bradley Timber Co. v. White* (1903), 121 Fed. 779, 784, 785, 58 C. C. A. 55; *Merwin v. Magone* (1895), 70 Fed. 776, 777, 17 C. C. A. 361; *Curtiss v. Teller* (1913), 157 App. Div. 804, 143 N. Y. Supp. 188, 189; *Zirinsky v. Post* (1906), 112 App. Div. 74, 98 N. Y. Supp. 132; *Trimble v. New York, etc., R. Co.* (1900), 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115, 119; *Trustees, etc. v. Vail* (1897), 151 N. Y. 463, 45 N. E. 1030. If these cases are to be followed, and they seem to be supported by good reason, it follows that no reversible error resulted from the giving of such peremptory instruction in appellee's favor, unless there was a complete failure of proof as to some issue necessary to the support of the verdict returned thereunder.

This brings us to a consideration of the sufficiency of the evidence to sustain such verdict. It is insisted by appel-

lant that there is a complete failure of proof in two

4. essential elements. (1) That no delivery or acceptance of the note in suit was proven. (2) That no consideration for the note was shown. In support of its first contention appellant relies on the following cases: *Godman v. Henby* (1905), 37 Ind. App. 1, 76 N. E. 423; *Carver v. Carver* (1884), 97 Ind. 497; *Digan v. Mandel, supra*; *Schele v. Wagner, supra*. The decisions cited, and many others that might be cited, hold, that the plea of *non est factum* puts on the party seeking to recover, the burden of proving the execution of the instrument on which

the recovery is asked. The controversy arises over what constitutes proof sufficient to make a *prima facie* case of execution. Appellant lays stress on the language con-

5. tained in the case of *Digan v. Mandel, supra*, and *Schele v. Wagner, supra*, to the effect that when the execution of the note is the question in issue *no presumptions* are indulged in its favor, and appellant seems to be impressed with the idea that this is especially true where the note is one filed against an estate, and from this he reasons that no presumption of delivery arises from the fact that the note in suit was shown to be in the hands of the payee's attorney at the time of the trial. We think the rule as to the proof necessary to create a *prima facie* case of the execution of an instrument to which the defense of *non est factum* has been interposed is the same whether the payor of the instrument be living or dead at the time of suit, and regardless of whether the action is by way of claim against the estate of the payor or by complaint against him. The only purpose or effect of §2842, *supra*, is to interpose in such cases certain defenses in behalf of the estate without special pleadings, and in such cases the burden of proving the execution of an instrument sued on, without the plea of "*non est factum*" being filed, is the same as where it is filed in other cases.

We are not, however, entirely free from doubt as to what the decisions really hold on the subject of what proof is necessary to make a *prima facie* case of delivery.

4. While the cases relied on by appellant, in their facts are easily distinguishable from the cases referred to therein where, as in the instant case, the note sued on was shown to be in the possession of the payee at the time of trial, yet there is language used in the cases relied on, which, in a sense, and to some degree, at least, tends to support appellant's contention that proof of possession of a note in the hands of the payee is not sufficient to authorize an inference or presumption of delivery of such note. However,

the Supreme Court, in the case of *Brooks v. Allen* (1878), 62 Ind. 401, 405, 407, which was a suit on a note where the defendant interposed the plea of *non est factum*, expressly approved an instruction which told the jury in effect that proof of the signing of such note together with the possession of the note by the payee and the introduction of the note in evidence warranted the jury in finding a verdict in favor of such payee for the principal and interest due on the note, unless this evidence was contradicted, etc. This seems to us to be an express holding that proof of the signing of the note together with possession by the payee makes a *prima facie* case of execution of the note. To the same effect are the following cases: *Goldsmith v. First Nat. Bank* (1912), 50 Ind. App. 11, 22, 96 N. E. 503; *Stayner v. Joyce* (1889), 120 Ind. 99, 22 N. E. 89; *Pate v. First Nat. Bank* (1878), 63 Ind. 254, 259; *Taylor v. Gay* (1842), 6 Blackf. 150, 152; *Garrigus v. Home, etc., Soc.* (1891), 3 Ind. App. 91, 95, 28 N. E. 1009, 50 Am. St. 262; *Talbott v. Hedge* (1892), 5 Ind. App. 555, 556, 32 N. E. 788; *Paulman v. Claycomb* (1881), 75 Ind. 64, 67; *Kimball v. Whitney* (1860), 15 Ind. 280, 284; *Bush v. Seaton* (1853), 4 Ind. 522. Several of these cases are cited and referred to in the case of *Digan v. Mandel, supra*, and while some of them are distinguished, none of them, except *Taylor v. Gay, supra*, are criticised, and this case is criticised because of the broad statement, not found in the other cases, to the effect, that the "ceremony of delivery does not attach to contracts" like that under consideration. The criticism of this statement in the light of the other cases was no doubt proper.

In that case (*Digan v. Mandel, supra*) at pages 593, 594, the court said: "In that case [*Brooks v. Allen, supra*], and also in the case of *Garrigus v. Home, etc., Soc., supra*, the declaration of law, that possession of a note will raise a presumption of delivery, was made with reference to notes in the possession of the payee therein named. We are not required to pass upon that question in this case." It seems therefore

that the cases cited have not been overruled or criticised in so far as the exact question now under consideration is involved, and hence they are binding on this court. We may say also that we think the announcements therein, affecting the question under consideration, are sound in principle.

6. ciple. We think this is so because possession in the hands of the payee, in and of itself, necessarily imports either an actual, or constructive, delivery by the payor to the payee, or at least imports that the possession of the payee is with the knowledge and consent of the payor rather than that such possession was wrongfully or illegally obtained by the payee. Under such circumstances a legal presumption exists in favor of that inference which imports good faith and right conduct. As supporting this conclusion see, Lawson, Presumptive Ev. 98. Such rule is also made necessary for the purpose of strengthening and facilitating the commercial intercourse which is carried on through all negotiable paper. 1 Edwards, Bills and Notes (3d ed.) 187, 188.

Appellant, however, insists that the note in suit was not shown to be in the possession of the payee. It is true, the evidence does not disclose actual possession in the

4. hands of the payee, but it does show such possession in his attorney at the time of the trial, and this, we think, was sufficient under the authorities. The possession of appellee's attorney was his possession. 4 Cyc. 935, and cases cited; *Ward v. Dougherty* (1888), 75 Cal. 240, 17 Pac. 193, 7 Am. St. 151; *Branson v. Caruthers* (1874), 49 Cal. 374.

7. Proof of possession of the payee of a note at the time of the trial is sufficient to make a *prima facie* case of delivery at the date of its execution, or at least, within the lifetime of the payor. *Maybury v. Berkery* (1894), 102 Mich. 126, 132, 60 N. W. 699; 1 Daniel, Negotiable Inst. (6th ed.) §65; 2 Ency. Evidence 475. See also, *Harrison v. Edwards* (1840), 12 Vt. 648, 651, 36 Am. Dec. 364; *Emery v. Vinall* (1846), 26 Me. 295.

It is further contended by appellant that the verdict of the jury can not stand because there was a total failure to prove a consideration for the note, on which appellee's

8. claim is based. It is true, that there was no proof of consideration independent of the note itself, but, we think, that in view of §9071 Burns 1914, §5501 R. S. 1881, and the decisions of both courts of appeal of this State, the note itself imports a consideration. *Fisher v. Fisher* (1888), 113 Ind. 474, 476, 15 N. E. 832; *Louisville, etc., R. Co. v. Caldwell* (1884), 98 Ind. 245, 252, and cases cited; *Spurgeon v. Swain* (1895), 13 Ind. App. 188, 189, 41 N. E. 397; *Woodworth v. Veitch* (1902), 29 Ind. App. 589, 64 N. E. 932, and cases cited; *Magic Packing Co. v. Stone, etc., Co.* (1902), 158 Ind. 538, 64 N. E. 11. It is true the note in suit is not negotiable under the law merchant, and does not contain the words "for value received". The note, however, is negotiable under our statute (§9071, *supra*), and hence imports a consideration, even though the words "for value received" are absent. *Woodworth v. Veitch, supra*; *Benjamin v. Tillman* (1840), 3 Fed. Cas. 190, 191; *Dean v. Carruth* (1871), 108 Mass. 242, 244; Norton, Bills and Notes (3d ed.) 73; 1 Daniel, Negotiable Inst. (3d ed.)

§108. While consideration is usually expressed by

9. the words "value received", these words are not essential to the negotiability of a note unless they are required by statute. 7 Cyc. 609. See also, *Carnwright v. Gray* (1891), 127 N. Y. 92, 27 N. E. 835, 24 Am. St. 424, 12 L. R. A. 845, and authorities cited.

We have, we believe, considered all the questions presented by appellant's brief, and find no available error in the record. The judgment below is therefore affirmed.

NOTE.—Reported in 107 N. E. 304. As to burden of proving want of consideration, see 135 Am. St. 763. As to the effect of a request by both parties for direction of verdict, see 6 Ann. Cas. 545; 13 Ann. Cas. 372; Ann. Cas. 1913 C 1342. See, also, under (1) 3 C. J. 1388; 2 Cyc. 999; (2) 18 Cyc. 1011; (3) 38 Cyc. 1582; (4) 8 Cyc. 282; (5) 18 Cyc. 1029; (6) 8 Cyc. 219; (7) 8 Cyc. 282; (8) 8 Cyc. 222.

KLITZKE ET AL. v. SMITH.

[No. 8,732. Filed June 25, 1915.]

1. *APPEAL.—Review.—Refusal of Instructions.*—Where appellant concedes that an instruction given by the court was of the same tenor as one requested by appellant and refused, excepting as to a date set forth therein, and there was no material dispute as to the correctness of the date stated in the court's instruction, and the latter was neither erroneous nor otherwise complained of, there was no error in refusing the requested instruction. p. 464.
2. *APPEAL.—Refusal of Instructions.—Tender After Commencement of Argument.*—Error can not be predicated on the refusal to give an instruction which was not tendered until after the argument began. p. 465.
3. *APPEAL.—Review.—Verdict.—Amount of Recovery.*—Reversal can not be predicated on the alleged excessiveness of the verdict, where appellant has neither pointed out in what manner the amount of recovery is too large, nor cited any authorities to sustain his point, and the facts and figures show that the amount of the finding was within the evidence heard by the jury. p. 645.

From Fulton Circuit Court; *Smith N. Stevens*, Special Judge.

Action by William H. Smith against William C. Klitzke and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Holman, Stephenson & Bryant and *J. H. Bibler*, for appellants.

C. C. Campbell and *Enoch Myers*, for appellee.

SHEA, C. J.—This is the second appeal in this case. *Klitzke v. Smith* (1910), 46 Ind. App. 26, 91 N. E. 748. The former appeal was decided adversely to appellee upon the ruling of the court in sustaining a demurrer to appellants' answer to the amended complaint. Appellee brought this action against appellants to recover the amount of three promissory notes, dated November 4, 1903, aggregating \$1,100, executed by appellants to him to cover balance due on the purchase price of a dairy plant at Leiters Ford,

Indiana. The amended complaint upon which the cause was tried was in three paragraphs each paragraph alleging that appellants are jointly and severally indebted to appellee in the sum evidenced by the respective notes.

Appellants answered in four paragraphs, the first a general denial. The second amended paragraph of answer admits the execution of the notes sued on, but avers that appellee ought not to maintain the action against them because the notes were given as part of the purchase price of a lease of lands, together with all buildings and appliances thereon constituting a dairy plant; that appellee failed to secure the written consent of the railroad company to transfer the lease of the lands and appellants refused to make further payments until it was transferred. It is also averred, in substance, that appellee on February 14, 1904, commenced this action on the note then due, and to foreclose the chattel mortgage securing it; that on May 31, 1904, one Doud offered to purchase said milk station of appellants who were then in possession and operating it; that appellants notified Doud of the pendency of this suit, the amount in controversy, and the trouble with appellee; that Doud was to see appellee and arrange with him for a dismissal of this suit, take up and cancel the notes and satisfy the chattel mortgage, and for a certain additional sum appellants would sell and transfer the lease, milk station and equipment to Doud; that Doud informed appellee he was about to purchase the property and wanted it free from encumbrance and litigation, whereupon appellee and Doud entered into the following written agreement:

“Leiters Ford, Indiana, May 31, 1904. Received of J. W. Doud seventy-five dollars in consideration of my cancelling suit now pending against Klitzke Brothers of Athens and Hammond, Indiana, the said suit and judgment involving the plant and machinery at Leiters, Indiana. I agree to accept seven hundred twenty-five dollars additional in consideration and in full satisfaction for amount of eleven hundred dollars due me from Klitzke

Brothers, said amount to be paid within ten days, providing suit is cancelled and cancelled notes turned over to said J. W. Doud. W. H. Smith, J. W. Doud."

That immediately upon the execution of said contract, Doud presented it to appellants, and relying on the terms and conditions therein contained for their benefit, they sold, transferred and delivered the property to Doud, who has since been in possession thereof.

The third paragraph of appellants' answer avers that appellee should not maintain the action against them because prior to the filing of the amended complaint appellee's claim was fully paid and satisfied.

Appellants' fourth paragraph of answer avers that appellee is not the real party in interest; that since the commencement of this suit he has sold and transferred his interest in the notes to Doud, who is not a party to the suit; that appellants relying upon appellee's statements that he had sold and transferred said notes, and with appellee's knowledge and consent, have fully paid the notes to Doud by a sale and transfer of the milk station and equipment at Leiters Ford, Indiana; that said Doud should be made a party defendant.

An amended cross-complaint was also filed by appellants, setting up the contract and substantially the same facts contained in the second paragraph of answer, alleging in addition that appellants have performed all the conditions of the contract, and that Doud has performed all the conditions thereof so far as appellee would permit him to do so, and is ready and willing to carry out his part, praying that appellee be ordered to perform his part by dismissing this action and cancelling the notes. Appellee filed reply in general denial to the third and fourth paragraphs of answer, also a verified reply to the second amended paragraph of answer and appellants' cross-complaint averring that he did not execute the alleged contract as set out in said paragraph of answer and cross-complaint. A trial of the issues resulted in a judgment for appellee for \$1.686 35. The only

error relied on for a reversal is the overruling of appellants' motion for a new trial.

The first question presented is the alleged error of the trial court in refusing to give instruction "A" tendered by appellant reading as follows: "If you find by a

1. preponderance of the evidence that in May, 1904, plaintiff and defendants entered into the following contract viz: 'Received of J. W. Doud \$75.00 in consideration of my cancelling the suit now pending against Klitzke Brothers, etc. * * *' And if you find by a preponderance of the evidence that the suit to be dismissed and the notes to be cancelled was this suit and the notes to be cancelled were the notes in suit in this action and that said \$75 provided in said contract to be paid was paid by said Doud to said Smith and accepted and kept by said Smith and this suit was not dismissed by said Smith and that the defendants accepted the terms of said contract plaintiff can not recover in this action." It is stated by appellants' counsel that the court's instruction "A 5" to the giving of which appellant excepted was of the same tenor and effect as appellants' instruction "A" except as to date. Instruction "A 5" reads as follows: "If you find by a preponderance of the evidence that on May 31st, 1904, plaintiff and defendants entered into the following written contract viz: (here contract is set out) and if you find by a preponderance of the evidence that the suit to be dismissed and the notes to be cancelled was this suit and the notes to be cancelled were the notes in suit in this action and that said \$75 provided in said contract to be paid was paid by said Doud to said Smith and accepted and kept by said Smith and this suit was not dismissed by said Smith and that the defendants accepted the terms of said contract plaintiff cannot recover in this action." In the instruction given by the court the date is stated as May 31, 1904. In view of these facts, if any error could be predicated on the refusal to give appellants' instruction "A", it was cured by giving instruction "A 5"

Buffalo Specialty Co. v. Indiana, etc., Wire Co.—59 Ind. App. 465.

which appellants' counsel say was of the same tenor. However, said instruction was not erroneous, as there was no material dispute that the date fixed was the correct one, and the instruction is not otherwise complained of.

Instruction "D" requested by appellant and refused was not tendered until after the argument began, therefore no error can be predicated upon the refusal to give it.

2. *Cleveland, etc., R. Co. v. Ward* (1897), 147 Ind. 256, 45 N. E. 325, 46 N. E. 462; *White v. Sun Pub. Co.* (1905), 164 Ind. 426, 73 N. E. 890.

It is properly presented in the motion for a new trial that the assessment of the recovery is erroneous, being too large.

It is not clearly pointed out in what manner the

3. amount of recovery is too large, and no authorities are cited by appellants to sustain the point. An examination of the facts and figures convinces us that the amount of the finding is within the evidence heard by the jury. §585 Burns 1914, §559 R. S. 1881. There was evidence to sustain every material allegation of each paragraph of appellee's complaint. The verdict of the jury is not contrary to law. No reversible error is presented by this record. Judgment affirmed.

NOTE.—Reported in 100 N. E. 412. As to what are proper subjects for instructions to jury, see 72 Am. Dec. 538. See, also, under (1) 3 Cyc. 248; (2) 38 Cyc. 1698; (3) 3 C. J. 1383; 2 Cyc. 996, 997.

BUFFALO SPECIALTY COMPANY v. INDIANA RUBBER AND INSULATED WIRE COMPANY.

[No. 8,430. Filed October 5, 1915.]

1. **APPEAL.—Review.—Pleading.—Presumptions.**—Where the record fails to show that any answer was filed to certain paragraphs of the complaint, or that a reply was filed to a special paragraph of answer, it will be presumed on appeal from the judgment that at least a general denial was filed to such pleadings. p. 468.

Buffalo Specialty Co. v. Indiana, etc., Wire Co.—59 Ind. App. 465.

2. **APPEAL.—Review.—Moot Questions.**—In an action for damages and injunctive relief for the violation of an agreement executed in connection with the assignment of letters patent covering a manufacturing process, where the record disclosed that plaintiff dismissed its demand for damages, and it also appears that such letters patent have expired, the question of whether the denial of the injunctive relief was error need not be determined, since any right or privilege covered by the letters terminated with their expiration, leaving the question merely a moot one. p. 469.
3. **APPEAL.—Review.—Affirmance.**—Where an agreement unaided by extrinsic evidence was not susceptible of the interpretation placed thereon by plaintiff, and there was practically no evidence to show mutual mistake, the action of the trial court in denying a reformation of the instrument and refusing injunctive relief against its alleged violation, being in accord with the great weight of the evidence and the law applicable thereto, can not be disturbed. p. 470.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by the Buffalo Specialty Company against the Indiana Rubber and Insulated Wire Company. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

E. G. Mansfield and Condo & Browne, for appellant.

H. M. Elliott and Miller, Shirley, Miller & Thompson, for appellee.

HOTTEL, J.—On November 5, 1898, and for some time prior thereto the appellant and appellee were each a corporation engaged in the manufacturing business, viz., appellee was engaged in the business of manufacturing and selling bicycle tires at its factory in Jonesboro, Grant County, Indiana, and the appellant was engaged in the business of manufacturing and selling certain articles known as bicycle specialties, among which, was a liquid compound put up in tin cans to be used in, and applied to, bicycle tires for the purpose of automatically healing and sealing wounds or punctures therein. Prior to said date one Charles Duryea of Peoria, Illinois, had filed with the commissioner of patents a petition praying for a grant of letters patent for an alleged new and useful improvement in vehicle tires and

Buffalo Specialty Co. v. Indiana, etc., Wire Co.—59 Ind. App. 465.

had assigned his right, title and interest in said improvement to appellee. Under such petition, and the assignment of Duryea's rights thereunder to appellee, letters patent were issued, March 9, 1897, granting to appellee the exclusive right to make, use and vend said invention throughout the United States and the territories thereof for a term of seventeen years from that date. The invention covered by such letters patent was a *process* for treating bicycle tires whereby punctures therein would become automatically closed and sealed, the patented process seeming to consist chiefly in the introduction, use and application of a free flowing liquid in, and into, the air-containing tube of a bicycle tire, so that, in case of puncture, the escaping air from inside the tube forces the sealing agent or liquid into the wound or puncture in such tube and thereby automatically closes it and prevents the escape of air therefrom.

On November 5, 1898, appellee sold and assigned to appellant its said letters patent at the same time taking from appellant an agreement containing the following provisions or grant, viz.,

“A shop license under said letters patent with the privilege to manufacture and use said material or materials in its factory and also in the factory of the Peoria Rubber and Manufacturing Company of Peoria, Illinois; but said second party hereby covenants and agrees not to manufacture for sale, sell nor offer for sale in any wise any of said material, and also that the said Peoria Rubber and Manufacturing Company likewise will not manufacture for sale, nor offer for sale the same, during the continuance of this contract, except in a local retail way from the factories of each of said The Indiana Rubber and Insulated Wire Company and said Peoria Rubber and Manufacturing Company, respectively.”

Prior to, and at the time, it sold its letters patent and took its shop license agreement, appellee had been manufacturing and selling from its factory at Jonesboro, and from the factory at Peoria, Illinois, in which appellee was interested, bicycle tires treated by it with the process described in said

Buffalo Specialty Co. v. Indiana, etc., Wire Co.—59 Ind. App. 465.

letters patent, and it continued to manufacture and sell tires so treated continuously up to 1911, when it was manufacturing and selling from such factories, bicycle tires so treated at the rate of 40,000 or more a year. On the last mentioned date appellant filed its suit in the court below to enjoin appellee from further manufacturing and selling such tires and to recover damages sustained on account of sales already made. Appellant's complaint in said action is in three paragraphs.

In the first and second paragraphs it alleges in substance that by the shop license agreement entered into between it and appellee it was mutually understood and intended that appellee would have the right to treat with said patented process such of the bicycle tires manufactured by it as it might sell in a *local retail way only* from its factories at Jonesboro, Indiana, and Peoria, Illinois, and also such tires as it might manufacture for its use and the use of its friends and employes locally; that they attempted to reduce their verbal agreement to writing, which agreement is set out and that by the mutual mistake and inadvertence of the parties and the scrivener the writing failed to express the agreement as made; that appellee has been and is treating its tires manufactured in its factories with the patented process and is selling from such factories to the public generally 50,000 tires a year, making a profit thereon of \$25,000 a year. The prayer of these paragraphs is for reformation of the contract, injunction and damages. The third paragraph of complaint proceeds on the theory that the shop license agreement as written correctly expressed the agreement of the parties and that appellee's manufacture and sale of tires at wholesale and to the public generally is in violation of the proper and legal interpretation of such agreement as written. The first paragraph of complaint is answered by general denial and by special answer by way of estoppel. The record does not disclose any answer to the second and third paragraphs of complaint or

1. answered by general denial and by special answer by way of estoppel. The record does not disclose any answer to the second and third paragraphs of complaint or

Buffalo Specialty Co. v. Indiana, etc., Wire Co.—59 Ind. App. 465.

any reply to the special answer, but this omission is not of controlling importance, as this court will assume that a general denial at least was filed to such pleadings.

Appellee filed a cross-complaint in which it is also sought to reform said shop license agreement and have it express the verbal agreement according to its understanding thereof as averred in such cross-complaint, viz., that such shop license agreement in so far as it affected appellee's right to manufacture and sell self-healing tires was to be without limitation, that the only limitation intended by such agreement was a limitation on the right to manufacture and sell the compound or material used in the tires for the purpose of automatically healing or sealing punctures. There was a general denial filed to the cross-complaint. The cause was submitted to the court for trial and before the close thereof appellant "dismissed its claims and demands for the recovery of damages". The court found in favor of appellee and against appellant on the complaint and against appellee on its cross-complaint and that the costs of the action should be taxed against appellant. Judgment was rendered accordingly in favor of appellee.

Appellant filed a motion for new trial which was overruled, and this ruling alone is relied on for reversal. Such motion contains but two grounds, viz., (1) the decision is not sustained by sufficient evidence; and (2) is contrary to law.

The correctness of appellant's contention in its last analysis must depend on the construction or interpretation that

should be given to the shop license agreement on

2. which each paragraph of its complaint is based, and the record, as before indicated, shows that appellant, before the close of the trial below, on its own motion, "dismissed its claim and demands for the recovery of damages" so that the only remaining effective relief sought or obtainable by appellant under either paragraph of its complaint is the injunctive relief therein demanded. There is,

Buffalo Specialty Co. v. Indiana, etc., Wire Co.—59 Ind. App. 465.

of course, the reformatory relief asked in the first and second paragraphs of complaint, but in the absence of a demand for damages such relief is merely preliminary to and of no importance without the injunctive relief demanded. The injunctive relief could not now be granted; even though appellant's interpretation and construction of the shop license agreement be correct, because the rights of both appellant and appellee under such agreement necessarily depend on the letters patent, and with the expiration or death of such letters patent any right or privilege covered by such agreement also died. The record discloses that such patent expired March 9, 1914. It follows that the real and only question presented by the appeal is a moot one, and hence need not be decided by this court. *Brown v. Dicus* (1909), 172 Ind. 51, 54, 87 N. E. 716, and cases cited; *State, ex rel. v. Lyons* (1909), 173 Ind. 278, 90 N. E. 72; *Dunn v. State, ex rel.* (1904), 163 Ind. 317, 71 N. E. 890.

We may add, however, that our examination of the shop license agreement and the evidence in the case convinces us that the judgment below should be affirmed in any

3. event. We do not think said agreement, unaided by extrinsic evidence, susceptible of the interpretation and construction placed thereon by appellant, and, to entitle appellant to the reformation, asked in its first and second paragraphs of complaint, proof of the *mutual mistake* of the parties to the agreement as alleged in such paragraphs was necessary. *Roszell v. Roszell* (1887), 109 Ind. 354, 10 N. E. 114; *Baker v. Pyatt* (1886), 108 Ind. 61, 9 N. E. 112; *Nelson v. Davis* (1872), 40 Ind. 366; 11 Ency. Evidence 44. There was little or no evidence of this character. As to such paragraphs the decision of the trial court is in accord with the great weight of the evidence, and the law applicable thereto.

We find no available error in the record and the judgment below is therefore affirmed.

Wilson v. Kester—59 Ind. App. 471.

NOTE.—Reported in 109 N. E. 782. Mutual mistake as ground for reformation of written instruments, see 3 Ann. Cas. 444. See, also, under (1) 3 Cyc. 288, 290; (2) 2 Cyc. 533, 535; 3 C. J. 300, 364; (3) 3 Cyc. 370; 34 Cyc. 986.

WILSON ET AL. v. KESTER ET AL.

[No. 8,737. Filed October 5, 1915.]

1. APPEAL.—*Questions Reviewable.—Evidence Not in Record.*—Where the only questions sought to be presented depend upon the evidence, and the evidence is not in the record, there is nothing to be determined. p. 471.
2. APPEAL.—*Bill of Exceptions.—Filing.—Extension of Time.*—Under §656 Burns 1914, §626 R. S. 1881, an extension of the time beyond the term for filing a bill of exceptions, to be effective, must be granted when the motion for a new trial is overruled. p. 471.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by Mary A. Kester against Ella S. Wilson and others. From the judgment rendered, Ella S. Wilson and another appeal. *Affirmed.*

G. A. Henry and *J. T. Strange*, for appellants.

Hiram Brownlee and *Orlando L. Cline*, for appellees.

FELT, J.—The only error assigned and relied on for reversal of the judgment of the lower court is the overruling of appellants' motion for a new trial. The only ques-

1. tions attempted to be presented under the motion for a new trial depend upon the evidence which is not properly in the record, and can not therefore be considered.

The motion for a new trial was overruled on June 23, 1913, and on June 30, 1913, at the same term of court, appellants were given ninety days to file their bill of

2. exceptions containing the evidence. Under the statute and repeated decisions of both our courts of last resort, to be effective, an extension of time beyond the term, in which to file a bill of exceptions, must be granted when

Julius Keller Constr. Co. v. Herkless—59 Ind. App. 472.

the motion for a new trial is overruled. §656 Burns 1914, §626 R. S. 1881; *Huntington Brewing Co. v. Miles* (1912), 177 Ind. 109, 96 N. E. 145; *Stremmel v. Gaar, Scott & Co.* (1911), 176 Ind. 600, 96 N. E. 703; *Theobald v. Clapp* (1909), 43 Ind. App. 191, 87 N. E. 100; *Brown v. American Steel, etc., Co.* (1909), 43 Ind. App. 560, 88 N. E. 80. Judgment affirmed.

NOTE.—Reported in 109 N. E. 744. See, also, under (1) 3 Cyc. 164.

**JULIUS KELLER CONSTRUCTION COMPANY ET AL.
v. HERKLESS ET AL.**

[No. 8,647. Filed October 7, 1915.]

1. **APPEAL.—Review.—Motion to Make Specific.—Record.**—No question is presented for review on the overruling of a motion to make the complaint more specific where it can not be determined from the record whether appellant assigning the error, or some other defendant, filed the motion. p. 476.
2. **APPEAL.—Assignment of Errors.—Sufficiency of Complaint.**—In actions commenced since the enactment of §§344, 348 Burns 1914, Acts 1911 p. 415, no question is presented on appeal by an assignment of error challenging the sufficiency of the complaint. p. 477.
3. **NEGLIGENCE.—Trial.—Instructions.**—In an action by the contractor for the construction of a cement curb and gutter, against the city and a contractor for the construction of a sewer, to recover damages occasioned by alleged negligence in the sewer construction resulting in injuring and impeding the work under construction by plaintiff, an instruction that municipal corporations are within the general rule that the superior or employer must answer civilly for the negligence of an agent or servant in the course of his employment, etc., and that if it was found that a contract was entered into by the city with its codefendant for the construction of a sewer, pursuant to which the sewer was constructed as alleged, and that in such construction the contractor was negligent in any one or more particulars as alleged, both the city and the sewer contractor would be liable to plaintiffs for all damages sustained, if any, which were alleged and were shown by a preponderance of the evidence to have proximately resulted from the acts complained of, was not open to the objection that it made defendants liable for all damages resulting from the work of the

construction company if it were found to have been guilty of negligence in but one alleged particular, and regardless of whether such negligence was a proximate cause of all such damage. p. 477.

4. **NEGLIGENCE.—Injury to Property.—Contributory Negligence.—Instructions.**—An action for injury to a street improvement in course of construction by plaintiff, caused by alleged negligence of defendants in the construction of a sewer along the line of such improvement, involved a property, rather than a personal injury, making it the duty of plaintiff to prove the allegation of his complaint that he was free from contributory negligence; hence an instruction that if defendant contractor was negligent as alleged, it and the defendant city were liable for all damages alleged and shown by a preponderance of the evidence to have proximately resulted from such negligence, was fatally erroneous in ignoring the issue of contributory negligence, in view of evidence tending to show contributory negligence, and the failure of the court to cover the issue in any other instruction. p. 478.

5. **MUNICIPAL CORPORATIONS.—Liability for Negligence of Contractor.—Instructions.**—In an action against a city and a contractor for the construction of a sewer to recover damages to a street improvement being constructed by plaintiff, alleged to have been caused solely by negligence in the work of constructing the sewer, where it appeared that the sewer contract was let by the city and the work done pursuant to §8722 *et seq.* Burns 1914, Acts 1905 p. 219, §117, and that by the terms of the contract the defendant contractor was to furnish all labor and material and assume liability for injuries to person or property, the city reserving to itself merely the right of general supervision with respect to whether the work and material complied with specifications, etc., instructions that a city is liable if it undertakes to construct a sewer and causes the work to be done in a negligent manner, and that cities are within the general rule that an employer must answer civilly for the negligence of an agent or servant, etc., were erroneously given, since the city's codefendant was an independent contractor, rather than the agent or servant of the city. pp. 480, 482, 485, 486, 487.

6. **MUNICIPAL CORPORATIONS.—Incorporation.—Authority to Contract.—Presumptions.**—It will be presumed that a city of this State is incorporated under the general laws of the State for the incorporation of cities, so as to be authorized to provide for the construction of sewers under §8061 Burns 1914, Acts 1905 p. 219, §267. p. 482.

7. **MUNICIPAL CORPORATIONS.—Negligence of Independent Contractor.—Liability.**—A municipal corporation, like other contractors, is not answerable for the acts of an independent contractor, except where the work required to be done is inherently

or intrinsically dangerous, or where the necessary consequence of doing the work as specified is injury to another, or where it is unlawful or involves a trespass, or where the subject-matter of the contract involves a duty, the performance of which may not be delegated by the contractee. p. 484.

8. MUNICIPAL CORPORATIONS.—*Negligence of Independent Contractor.—Liability.—Defective Plans.*—A city is not liable in any case for consequential injury resulting from a public work, unless the plan is defective or the city directs the work to be done in an improper manner and the injury is the necessary consequence, in which event the one performing the work, though an independent contractor, will be regarded as the agent of the city in carrying out the defective plan or in doing the work pursuant to improper directions. p. 484.

9. MUNICIPAL CORPORATIONS.—*Negligence of Independent Contractor.—Liability.—Nondelegable Duties.*—In situations involving certain duties resting primarily and absolutely on the city and the performance of which it may not delegate to another to its own exemption, both the city and an independent contractor may be liable for injuries arising from the acts or omissions of the latter, unless the injury results entirely from some collateral act of the latter of which the city has no notice, either express or implied; the liability of the contractor being predicated on his own negligence, while that of the city is upon the fact that in committing to the contractor a nondelegable duty it makes him to that extent its agent for whose negligence it is liable. p. 485.

10. MUNICIPAL CORPORATIONS.—*Public Improvements.—Injury to Third Persons.—Duty of City.*—The nature of the duty owing from a municipality to third persons, growing out of the construction of a public improvement, varies somewhat with the class to which the third person belongs, as to whether he is an abutting owner, a traveler on a street, or an employe of the contractor. p. 486.

11. MUNICIPAL CORPORATIONS.—*Public Improvements.—Negligence of Contractor.—Liability to Abutters.*—A city owes no duty to an abutter to protect adjoining property against the negligence of a contractor in constructing a public improvement, where the plan is reasonable and not likely to work injury if properly carried out, though it may be liable if, through the negligence of the contractor, a situation perilous to adjoining property arises, and, after receiving or being chargeable with notice, it negligently fails to take steps to avert the threatened danger. p. 487.

From Rush Circuit Court; *Alonzo Blair*, Judge.

Action by Arvel R. Herkless and another against the

Julius Keller Constr. Co. v. Herkless—59 Ind. App. 472.

Julius Keller Construction Company and another. From a judgment for plaintiffs, the defendants appeal. *Reversed.*

George W. Young, James V. Young, Leo M. Rappaport, Albrecht R. C. Kipp and Howard E. Barrett, for appellants.
Will M. Sparks and A. L. Gary, for appellees.

CALDWELL, J.—The substance of appellees' complaint is as follows: In 1906, appellant city of Rushville by regular proceedings contracted with appellees to furnish the material and perform the work in the improvement of Arthur Street in said city from Third Street north to the corporation line. The work consisted of grading the roadway and surfacing it with broken stone, and constructing cement gutters and stone curbing along the line of the roadway on each side. The cost of the work was to be assessed against the abutting owners as provided by statute. Appellees after the work had commenced were regularly granted extensions of time, within which to complete it, the extended periods expiring September 1, 1908. On July 1, 1907, appellees were prosecuting the work, and at that time had completed most of the curbing and guttering, and had graded and surfaced a large part of the roadway. On April 23, 1907, appellant city, by regular proceedings, contracted with appellant company for the construction of a sewer system in said city, including a sanitary sewer the entire length of Arthur Street. Commencing about July 1, 1907, appellant company, as a part of the work of constructing the sewer on Arthur Street, made an excavation the entire length of that street north of Third Street, eighteen feet deep and four feet wide, the west edge of which was within four feet of the east edge of the curb and gutter theretofore constructed by appellees, and placed therein a row of eighteen-inch sewer pipe as required by the contract, and thereupon, using loose dirt, filled the excavation not more than half full, and thereafter did nothing further at the work until April, 1908, all of which was done before appellees had completed their

contract. As a result of the manner in which appellant company did its work, the trench caved, causing extensive portions of the completed curb and gutter and the surfacing stone to fall into the excavation, thereby necessitating the reconstruction of parts of the work. In making the excavations appellant company at certain points destroyed the grade of the subsoil theretofore prepared by appellees for receiving the broken stone, and mixed loose dirt with the stone with which other parts of the grade had been surfaced, thereby necessitating extra work on appellees' part. As a result of the conduct complained of, appellees were required to restore the work so destroyed, to purchase extra stone, employ additional labor, pay demurrage on cars, retain a large road roller for a time otherwise unnecessary at an expensive rental, as a result of all which and other injuries specifically alleged, appellees were damaged \$3,000, for which they ask judgment. It is alleged that the acts complained of were done in a careless and negligent manner, and that appellees were not guilty of negligence contributing thereto. The charge against the city is that "all the officers and agents of said city of Rushville had full knowledge at the time of the occurrence of all said acts and omissions of said defendant construction company when the same occurred and then and there did negligently consent to and acquiesce in the same, and did then and there direct said defendant construction company to do said acts."

The cause having been placed at issue, a trial resulted in a verdict and judgment against both appellants for \$2,251.83, from which both appeal. Appellants jointly and also

1. each separately assign error. Appellant company's first assignment is based on the overruling of its alleged motion to require that the complaint be made more specific. At the time when such a motion was filed, and also when it was ruled on, the stockholders of appellant company also were defendants, the cause having been subsequently dismissed as to them. Respecting said motion, we

are in harmony with appellees in their contention that while it appears from the record that such a motion was filed and overruled, it cannot be determined from the record with any satisfactory degree of certainty that appellant company rather than some other defendant filed such motion. The assignment under consideration therefore presents no question.

Appellant city seeks to challenge the complaint by an independent assignment of error for insufficiency of facts.

This action was commenced in November, 1911, and

2. therefore after the amendment of 1911 to the practice act became effective. Such assignment therefore presents no question for our consideration. §§344, 348 Burns 1914, Acts 1911 p. 415; *Combs v. Combs* (1914), 56 Ind. App. 656, 105 N. E. 944; *Robinson v. State* (1912), 177 Ind. 263, 97 N. E. 929.

Each appellant challenges instructions Nos. 9, 11 and 13. Appellant company challenges also No. 10, and appellant city No. 8. Instruction No. 9 is as follows: "I in-

3. struct you that municipal corporations are within the operation of the general rule of law, that the superior or employer must answer civilly for the negligence or want of skill of an agent or servant in the course of their employment, by which another is injured. It is essential, however, to establish such a liability that the act or acts complained of must be within the scope of the corporate powers of such municipality. It was within the scope of the corporate powers of the city of Rushville to contract for the construction of a sewer, and I instruct you that if you find that the defendant, the city of Rushville, did on the — day of April, 1907, enter into a contract with the Julius Keller Construction Company for the construction of the sewer as referred to in plaintiff's complaint, and that said defendant company, pursuant to said contract, constructed said sewer on and along said Arthur Street, as alleged in plaintiff's complaint, and if you further find that in con-

structing said sewer said defendant company was negligent in any one or more particulars as described in the complaint relative to any one or more of the acts as therein alleged, then not only said defendant company, but also the defendant, the city of Rushville, would be liable to compensate the plaintiffs for all damages sustained by them, if any, which are alleged in the complaint, and are shown by a preponderance of the evidence to have been sustained by them as a proximate result of the act or acts so complained of." It is urged against instruction No. 9 that by it the court instructed the jury that appellants must be held liable for all damages resulting from the work of the construction company, if it should be found to have been guilty of negligence in but one of the particulars specified in the complaint and regardless of whether such negligence was a proximate cause of all such damage. We do not believe that the instruction is open to this objection. Fairly construed, it is to the effect that if the construction company was shown to have been negligent in but one of the particulars alleged, appellants were liable for all the damages resulting from such negligence as a proximate cause thereof, alleged in the complaint and established by a preponderance of the evidence; but if there were other acts of negligence proven as alleged resulting proximately in other injuries alleged and shown by a preponderance of the evidence, appellants were liable for these also.

It is urged against instruction No. 9 also that by it the court ignored the issue of contributory negligence formed by the complaint and the answers in general denial

4. filed thereto. The court gave no instruction on the subject of contributory negligence. As this case involves a property, rather than a personal injury, it was incumbent on the plaintiffs, in order that they might be entitled to recover, to prove the allegation of their complaint that they were not guilty of negligence contributing proximately to the injury for which they sought relief. §362

Burns 1914, Acts 1899 p. 58; *Fort Wayne, etc., Traction Co. v. Monroeville, etc., Tel. Co.* (1912), 179 Ind. 334, 100 N. E. 69. The substance of instruction No. 9 as related to the matter under consideration, is that if appellant company was negligent as alleged, both appellants were liable to compensate appellees for all damages alleged in the complaint, and shown by a preponderance of the evidence, suffered by them as a proximate result of such negligence. If, under an assumed state of facts, found to be true, a defendant is liable to compensate the plaintiff in damages, then there should be a verdict to that end. The verdict as matter of course should follow certainly such established liability. The effect of the instruction, therefore, is to direct the jury to return a verdict for appellees if the facts or elements hypothetically submitted are found from a consideration of the evidence to be true. *Goldsmith v. First Nat. Bank* (1912), 50 Ind. App. 11, 20, 96 N. E. 503. It is alleged in the complaint that appellant company by its negligence destroyed a line of cement gutters that appellees had constructed under their contract. Appellees in support of such allegation introduced evidence tending to establish that by reason of the negligent operations of appellant company several hundred feet of cement gutters along the east line of the roadway were damaged, and that a portion of it was caused to cave into the sewer excavation, and was thereby destroyed, and that as a consequence appellees were compelled to replace the damaged and destroyed gutters, in order that their work might be accepted by the city. Appellants, however, introduced evidence tending to establish that the gutter was defectively constructed; that some portions of it were thicker and some thinner than as specified; that appellees permitted it to freeze while hardening, resulting in portions of it being soft and brittle, and that whatever injury resulted to it grew out of appellees' faulty and negligent construction; that the gutters were removed and replaced by new con-

Julius Keller Constr. Co. v. Herkless—59 Ind. App. 472.

struction, not by reason of any injury inflicted by appellant company, but because the city authorities had theretofore condemned them and ordered their removal. There was then evidence to the effect that appellees' fault at least contributed proximately to producing a part of the alleged damage for which a recovery was sought. This element was excluded from consideration by instruction No. 9, and the giving of it was therefore error. See the following: *Rhea v. Sawyer* (1913), 54 Ind. App. 512, 102 N. E. 52; *Chicago, etc., R. Co. v. Glover* (1900), 154 Ind. 584, 57 N. E. 244; *Hutchinson v. Wenzel* (1900), 155 Ind. 49, 56 N. E. 845; *Rahke v. State* (1907), 168 Ind. 615, 81 N. E. 584; *Nickey v. Steuder* (1905), 164 Ind. 189, 73 N. E. 117; *Terre Haute, etc., Traction Co. v. Young* (1914), 56 Ind. App. 25, 104 N. E. 780; *Dudley v. State* (1907), 40 Ind. App. 74, 81 N. E. 89; *Voris v. Shotts* (1898), 20 Ind. App. 220, 50 N. E. 484; *American, etc., Tin Plate Co. v. Bucy* (1909), 43 Ind. App. 501, 87 N. E. 1051; *Indiana Nat. Gas, etc., Co. v. Vauble* (1903), 31 Ind. App. 370, 68 N. E. 195; *Kentucky, etc., Bridge Co. v. Eastman* (1893), 7 Ind. App. 514, 34 N. E. 835.

The fact that no instruction on the subject of appellees' contributory fault was given by the court tends to magnify the effect of the omission of that element from instruction No. 9. Instructions Nos. 10 and 11 do not supplement No. 9 in the matter under consideration. In fact, the same infirmity, perhaps to a less marked degree, exists also in those instructions. In other respects, however, instruction No. 11 tends rather to aggravate the error in No. 9, in that the natural effect of the former in the minds of the jurors would necessarily be to minimize the force that should be assigned to the fact of faulty construction by appellees.

Appellant city complains also of instruction No. 8, and of certain additional features of instruction No. 9.

5. Instruction No. 8 is as follows: "When a municipal corporation undertakes to construct a sewer, such

corporation must exercise ordinary care and skill in performing the work. A city is liable if it causes a public work, such as the construction of a sewer, to be done in a negligent manner. The care to be exercised in devising and carrying into effect the work of constructing a public sewer should be fairly proportionate to the nature and magnitude of the undertaking, and the consequences likely to flow from a negligent breach of duty." The additional features of instruction No. 9 to which the city objects are those whereby the court instructed the jury in substance that municipal corporations are within the operation of the general rule of law that the employer must answer civilly for the negligence or want of skill of an agent or servant in the course of his employment, by which another is injured, and that if the city contracted with the construction company to build the sewer, and if, pursuant to the contract, the construction company did build the sewer, but in so doing was guilty of negligence to the injury of appellees, the city is liable. The objection to instruction No. 8 and to such features of No. 9 goes to them as applied to this case, rather than as abstract principles of law. In determining whether the instructions under consideration, as applied to this case, are correct expositions of the law, we are required to ascertain the nature of the contract between appellants for the construction of the sewer as revealed by the complaint and the evidence. The charge in the complaint is that the city, pursuant to a resolution of the common council to that effect, entered into a contract in writing with appellant company for the construction of a sewer and that in performing the work, the construction company was negligent as alleged. There is no allegation that the city, by the terms of the contract reserved the right to direct the details of the work, or that its nature was such that injury to appellees or others should necessarily or reasonably have been expected to result from its performance, or that the plans were improper or defect-

ive, or that the work was unlawful. The complaint in these particulars is to the effect that the construction company negligently performed the work under a lawful contract, and under plans proper in themselves and properly

6. adopted. It is to be presumed that the city of Rushville is incorporated under the general laws of the State providing for the incorporation of cities. *City of Logansport v. Dick* (1880), 70 Ind. 65, 36 Am. Rep. 166. It was therefore authorized to provide for the construction of public sewers. §8961 Burns 1914, Acts 1905 p. 219, §267.

The records of the preliminary proceedings and 5. copies of the plans and specifications, contract, bond, etc., were read in evidence, from which we are able to ascertain that the work was done under §8722 *et seq.* Burns 1914, Acts 1905 p. 219, §117. The contract, by its terms, included the plans, specifications and profiles. An inspection of the contract discloses that by it the construction company was obligated to furnish all the materials and perform the labor as specified, and to do the work according to the plans and specifications for certain sums itemized against the respective portions of the work, and to deliver to the city a completed structure. It was specified that the work should be done at the contractor's risk, and that he should assume all responsibility for damages to the work, or to persons or property along the line of the work, which might result from floods or other causes, or to the paving of streets or buildings along the line of the work. The city, however, by its proper officers, reserved the power of general supervision over the work, as the right to determine whether the material being furnished and the work being done were as specified; to require that incompetent or disorderly workmen be discharged, and on the approach of winter, to require, if weather conditions demanded it, that the work suspend until spring, and in such case, that the contractor take steps to preserve the work and for the protection of the public. There is a provision that the con-

tractor should save the city harmless from all liability growing out of any injury or damage to persons or property because of any negligence or fault of such contractor, his agents, or employes in the execution of the work, and that he give bond to that effect, and to secure the completion of the work and the payment of claims as required by §8959 Burns 1908, Acts 1905 p. 219, §265, which bond was given.

From the foregoing facts it appears that the arrangement between the city and the construction company was to the effect that the latter in consideration of the equivalent of a lump sum to be paid, obligated itself to furnish all the material and labor necessary, and thereby to construct an entire improvement according to designated plans and specifications, free from the control of the city respecting how the work should be accomplished. It was the right of the city to require that a certain work be done, but except as outlined in the specifications, and as above indicated, it reserved no right to dictate how the result should be accomplished. The construction company must, therefore, be regarded as an independent contractor, rather than as an agent or servant of the city. *Prest-O-Lite Co. v. Skeel* (1914), 182 Ind. 593, 106 N. E. 365; *Wabash, etc., R. Co. v. Farver* (1887), 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; *Vincennes Water Co. v. White* (1890), 124 Ind. 376, 24 N. E. 747; *City of Richmond v. Sitterding* (1903), 101 Va. 354, 43 S. E. 562, 99 Am. St. 879, 65 L. R. A. 445, note. This is true, notwithstanding the provisions of the contract, by which as indicated the city reserved the right of general supervision. *Prest-O-Lite Co. v. Skeel*, *supra*; *Uppington v. City of New York* (1901), 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; *Salmon v. Kansas City* (1912), 241 Mo. 14, 145 S. W. 16, 39 L. R. A. (N. S.) 328; *Casement & Co. v. Brown* (1893), 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; *Foster v. City of Chicago* (1902), 197 Ill. 264, 64 N. E. 322.

It is well settled that as a general rule the contractee is not answerable for the acts of an independent contractor.

Julius Keller Constr. Co. v. Herkless—59 Ind. App. 472.

Stalder v. City of Huntington (1899), 153 Ind. 354, 7. 55 N. E. 88; *Ryan v. Curran* (1878), 64 Ind. 345, 31 Am. Rep. 123; *Vincennes Water Co. v. White*, *supra*; *Wabash, etc., R. Co. v. Farver*, *supra*. The general rule is applicable where the contractee is a municipal corporation. 6 McQuillin, Mun. Corp. §2662; *Leeds v. City of Richmond* (1885), 102 Ind. 372, 1 N. E. 711. To the general rule there are certain well-recognized exceptions, as where the work required by the contract to be done is inherently or intrinsically dangerous, or where the necessary consequence of doing the work as specified is injury to another, or where it is unlawful or involves a trespass, or where the subject-matter of the contract involves a duty, the performance of which may not be delegated by the contractee. 6 McQuillin, Mun. Corp. §2663; 28 Cyc. 1282; *Salliotte v. King Bridge Co.* (1903), 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620, and note.

A city can not in any case be held liable for consequential injury resulting from a public work properly planned, safeguarded and executed, regardless of whether the per-

8. formance of the work is committed to an independent contractor. But where the plan is defective or the city directs the work to be performed in an improper manner, and by reason of either the defective plan or the improper execution injury to others results as a necessary consequence, the fact that the performance of the work is committed to an independent contractor will not shield the city from liability. In such case, the independent contractor is the agent of the city in the act of carrying out the defective plan, or if the plan be not defective, in pursuing the work by an improper method as directed. For cases involving these principles, see the following: *Giaconi v. City of Astoria* (1911), 60 Or. 12, 113 Pac. 855, 118 Pac. 180, 37 L. R. A. (N. S.) 1150; *City of Chicago v. Robbins* (1863), 2 Black 418, 17 L. Ed. 298; *Thomas v. Harrington* (1903),

Julius Keller Constr. Co. v. Herkless—59 Ind. App. 472.

72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742, note; *Cummins v. City of Seymour* (1881), 79 Ind. 491, 41 Am. Rep. 618.

The case here does not come within the foregoing exceptions. The plan of the work is not attacked. Appellees' grievance is based on alleged negligent acts and omis-

5. sions in performing the work. Under the evidence, the construction company and not the city was responsible for such acts and omissions. If the work was negligently done, there was no evidence that the city directed that it should be so done. It is not claimed that injury would have resulted to appellees had the work as specified been done in a careful and prudent manner.

A city may be liable also for the acts and omissions of an independent contractor, in situations involving certain duties

resting primarily and absolutely on the city, the performance of which the city may not delegate to another to its own exemption. Thus municipalities are given authority over public streets within their respective jurisdictions. From such authority arises a duty to exercise reasonable care to keep such streets in condition reasonably safe for public travel. If the municipality orders or authorizes the construction of a work such as a sewer on, along or across a public street, the nature of the enterprise being such as to require that excavations be dug in the street or other dangerous obstructions placed therein, the necessary effect of which is to render the street unsafe for public travel, it is the duty of the municipality to take reasonable precautions to see that such obstructions are safeguarded, by the placing of lights at night, the erection of barriers or other proper means to that end. Such duty rests absolutely on the municipality and may not be delegated. If the municipality commits the performance of the work to an independent contractor, and through the neglect of the contractor in failing to safeguard the obstructions a traveler on the street is injured, the municipality as well as the contractor is liable. The contractor is liable by reason of

Lagrange v. Greer-Wilkinson Lumber Co.—59 Ind. App. 488.

Boomer v. Wilbur (1900), 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172; *St. Louis, etc., R. Co. v. Yonly* (1890), 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604; *Salliotte v. King Bridge Co., supra*; *Cabot v. Kingman* (1896), 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; *Laffery v. United States Gypsum Co.* (1910), 83 Kan. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912 A 590; *Solberg v. Schlosser* (1910), 20 N. Dak. 307, 127 N. W. 91, 30 L. R. A. (N. S.) 1111.

It is evident that both instructions Nos. 8 and 9, as applied to the facts in this case are erroneous. For the giving of these instructions there must be a reversal in behalf of the city, and a reversal in behalf of appellant construction company for error in instruction No. 9. We do not base our decision on the insufficiency of the evidence. Other questions presented are not determined as they may not arise on a retrial. The cause is reversed with instructions to sustain the motion of each appellant for a new trial.

NOTE.—Reported in 109 N. E. 797. Proximate and remote causes of injury from negligence, see 36 Am. St. 807. Liability of municipal corporation for acts or negligence of independent contractor in repairing or improving street or highway, see 16 Ann. Cas. 433. See, also, under (1) 2 Cyc. 1042; (2) 3 C. J. 1356; (3) 29 Cyc. 651, 652; (4) 29 Cyc. 652; (5) 28 Cyc. 1280, 1282; (6) 28 Cyc. 178; (7, 8) 28 Cyc. 1280; (9) 28 Cyc. 1436, 1463; (10) 28 Cyc. 1266; (11) 28 Cyc. 1283.

LAGRANGE ET AL. v. GREER-WILKINSON LUMBER COMPANY.

[No. 8,533. Filed April 2, 1915. Rehearing denied June 18, 1915.
Transfer denied October 7, 1915.]

1. MORTGAGES.—*Liens*.—*Priority*.—The lien of a valid mortgage is superior to a subsequently acquired mechanic's lien unless the one claiming under the mortgage has acquired the legal title so as to work a merger of the estates represented by the deed and mortgage. p. 492.
2. MORTGAGES.—*Acquisition of Legal Title*.—*Merger*.—*Equity Rule*.—While in law there is a technical merger of the estates when the estate in fee and the equitable or mortgage estate meet in one person, a merger will be averted and the lien preserved under

Lagrange v. Greer-Wilkinson Lumber Co.—59 Ind. App. 488.

the equity rule when necessary to satisfy the ends of justice, as where one purchases real estate on which there is an encumbrance which he is not obligated to pay, and which he discharges to protect his title. p. 492.

3. MORTGAGES.—*Merger of Legal and Equitable Title.—Discharge of Encumbrance by One Primarily Liable.*—The payment of the debt by a purchaser of real estate who is primarily liable to discharge the encumbrance extinguishes the debt or lien and precludes him from invoking the equitable rule against merger for the protection of his property against valid liens thereon of other persons. p. 492.
4. MORTGAGES.—*Purchase of Legal Title by Surety.—Release of Principal.*—Where the surety on a note given to a bank obtained the legal title to land covered by a mortgage indemnifying him against loss by reason of his surety-ship, the bank was not bound to release the principal from his obligation on the note, though by the deed the surety made himself principal and became primarily liable to the bank for the debt. p. 493.
5. MORTGAGES.—*Acquisition of Legal Title.—Merger.—Intention.*—Intention, expressed, or gathered from the facts and circumstances, is an important and often controlling factor in determining whether a merger has taken place where both the equitable and legal title meet in the same person; and a clear intention to do so, will preserve the lien of a mortgage and prevent a merger, where such intention when carried into effect works no injustice and leads to equitable results. p. 493.
6. MORTGAGES.—*Acquisition of Legal Title.—Merger.—Preservation of Mortgage as Against Subsequent Lien.*—Where the surety on a note took an indemnifying mortgage covering the land of the principal, which was of no greater value than the amount of the debt, the security of one claiming under a mechanic's lien thereafter acquired against the property was not lessened by reason of the subsequent acquisition by such surety for his own protection of the legal title to the land under a deed which, while reciting that the principal was thereby released from personal liability, clearly showed an intention to preserve the mortgage lien, and, no merger of the mortgage lien in the legal title was thereby effected, since under the circumstances the surety was entitled to the preservation of the mortgage for his protection as against such mechanic's lien. p. 493.

From Gibson Circuit Court; *Herdis F. Clements*, Judge.

Action by the Greer-Wilkinson Lumber Company against Jonah G. Lagrange and others. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Lagrange v. Greer-Wilkinson Lumber Co.—59 Ind. App. 488.

John W. Brady, for appellants.

Lucius C. Embree and Morton C. Embree, for appellee.

FELT, J.—Appellee brought this action against appellants to foreclose a mechanic's lien on certain real estate in the city of Princeton, Indiana. The complaint contains the usual averments, and it is also alleged that subsequent to the filing of notice of the lien, Winfield P. Larcy and Julia E. Larcy, his wife, sold and conveyed the real estate to Jonah G. Lagrange, who now holds the same subject to the lien of appellee; that appellant, Margaret Lagrange, is the wife of said Jonah G., and the other appellants severally assert some title to, and lien upon said lands, or some part thereof; that neither of said parties has any title or lien upon the land that is not junior and subject to appellee's lien.

To that part of the complaint which claims priority of lien, appellants, other than the Peoples National Bank, filed an answer which avers in substance that on October 25, 1907, appellant, Jonah G. Lagrange, as surety, and Winfield P. Larcy, as principal, executed their note to the American National Bank for \$5,000, payable six months from date in consideration of a loan then made to Larcy for that amount; that Larcy received all of the consideration and Lagrange at no time received any part thereof; that at the time of the execution of the note, and to induce Lagrange to sign it as surety, Larcy promised and agreed to execute to Lagrange a mortgage on all of the real estate described in the complaint and certain other real estate, all of which real estate Larcy agreed to and did purchase with the \$5,000 so borrowed by him; that said mortgage was executed on January 18, 1908, pursuant to their agreement and duly recorded and has never been released of record or cancelled; that at the date of the execution of the mortgage said Larcy was the owner of all the property described in it; that all of the property owned by Larcy was not of the value of more

than \$5,000; that Larcy and Lagrange renewed said note from time to time until December —, 1909, when Larcy left the State and went to parts unknown, leaving no property out of which said indebtedness could be collected, except the property mortgaged to Lagrange; that the entire indebtedness to the American National Bank is still owing; that Larcy has never returned to the State and has never acquired any property in this State since his departure; that on April 28, 1910, said Larcy by power of attorney, his wife Julia E. Larcy joining in the deed, conveyed all the real estate included in the mortgage to appellant, Jonah G. Lagrange; that the conveyance was made to Lagrange "solely in consideration of his release of said Winfield P. Larcy from personal liability on the aforesaid indebtedness; but with the further agreement that the lien of said mortgage should remain unimpaired"; that after the execution of said deed of conveyance to him, Lagrange as principal, and his codefendants, naming them, as his sureties, renewed the note held by the American National Bank, and the original indebtedness contracted to the bank by Larcy now evidenced by the last note is owing and unpaid; that to indemnify the sureties on such note Lagrange and his wife executed to his sureties a mortgage on said real estate, which mortgage is duly recorded; that by reason of the aforesaid facts the title of the defendants, Lagrange and wife, and the interest in and lien upon the real estate described in the complaint of the sureties on said last named note, and of said bank, are superior to any lien of the appellee on said real estate.

The appellants Jonah G. and Margaret Lagrange filed a separate partial answer averring substantially the same facts.

To each of these paragraphs of answer appellee demurred for insufficiency of the facts alleged to constitute a defense. The demurrers were sustained and exceptions reserved. Appellants refused to plead further and the court found for appellee and against the appellants and rendered judgment

in its favor for \$178.37, and for foreclosure of the lien. The rulings on the demurrers are separately assigned as error.

Appellee concedes the general principle, that a valid mortgage is superior and paramount to a subsequently acquired lien under the mechanic's lien law of this

1. State, but asserts that the mortgage relied on by appellants has been legally satisfied. It is the contention of appellants, however, that the original mortgage lien was not relinquished and is still in force and effect and prior to appellee's lien. The correctness of the rulings on the demurrers to the answers depends on the effect of the conveyance of the real estate to appellant, Lagrange. If the legal and equitable titles evidenced by the deed to Lagrange and by the mortgage which he seeks to preserve for his benefit, merged, the rulings were correct. If, on the facts averred, such estates did not merge, and the lien of the mortgage was preserved for the protection of appellants against appellee's lien then the rulings on the demurrers were erroneous.

Where a purchaser of real estate, for the purpose of protecting his title thereto, pays and discharges an encumbrance thereon, which in equity he was not bound to

2. pay and discharge, the lien of such encumbrance will be kept alive and enforced for his benefit. In law, when the estate in fee and the equitable or mortgage estate meet in one person there is a technical merger of the estates, and the equitable estate is absorbed by the legal; but in equity the merger will be averted and the lien preserved when necessary to satisfy the ends of justice. This rule applies where one purchases real estate on which there is an encumbrance which he is not obligated to pay, but which he discharges to protect his title. If the purchaser of

3. the legal title was primarily liable to discharge the encumbrance, his payment of the debt, or legal satisfaction of the lien, would not enable him to invoke the equitable rule to protect his property against valid liens

Lagrange v. Greer-Wilkinson Lumber Co.—59 Ind. App. 488.

thereon held by other persons. *Birke v. Abbott* (1885), 103 Ind. 1, 4, 1 N. E. 485, 53 Am. Rep. 474; *Springer v. Foster* (1901), 27 Ind. App. 15, 20, 60 N. E. 720; *Shirk v. Whitten* (1892), 131 Ind. 455, 456, 31 N. E. 87; *Coburn v. Stephens* (1894), 137 Ind. 683, 687, 36 N. E. 132, 45 Am. St. 218; *Hanlon v. Doherty* (1887), 109 Ind. 37, 40, 9 N. E. 782; *Opp v. Ward* (1890), 125 Ind. 241, 243, 24 N. E. 974, 21 Am. St. 220. Where one pays a debt or discharges an encumbrance he is primarily obligated to pay or discharge, such debt or lien is thereby extinguished. *Klippel v. Shields* (1883), 90 Ind. 81, 82; *Ritter v. Cost* (1884), 99 Ind. 80, 86; *Birke v. Abbott*, *supra*.

In the case at bar *Lagrange*, the grantee, was liable as surety to the bank, before he obtained the legal title to the land on which he held the indemnifying mortgage.

4. By the provisions of the deed he made himself principal and became primarily liable to the bank for the debt, but the bank was not bound to release Larcy
5. from his obligation on the note. *Gregory v. Arms* (1911), 48 Ind. App. 562, 568, 96 N. E. 196; *Birke v. Abbott*, *supra*. In a sense *Lagrange* made himself
6. primarily liable but not in the same sense as a grantee who assumes the payment of a mortgage debt for which he was not previously liable. In obtaining the legal title he shows a clear intention to preserve the lien and prevent a merger. Intention expressed, or gathered from the facts and circumstances, is an important and often controlling factor in determining whether a merger did, or did not take place. Where such intention when carried into effect does not work injustice, but leads to equitable results, the merger may be averted and the lien preserved for the benefit of the party who pays the debt. *Coburn v. Stephens* (1894), 137 Ind. 683, 686, 36 N. E. 132, 45 Am. St. 218; *Swatts v. Bowen* (1895), 141 Ind. 322, 326, 40 N. E. 1057; *Chase v. Van Meter* (1895), 140 Ind. 321, 333, 39 N. E. 445; *Stuckman v. Roose* (1897), 147 Ind. 402, 406, 46 N. E. 680;

Lagrange v. Greer-Wilkinson Lumber Co —59 Ind. App. 488.

Shirk v. Whitten (1892), 131 Ind. 455, 457, 31 N. E. 87; *Boos v. Morgan* (1891), 130 Ind. 305, 308, 30 N. E. 141, 30 Am. St. 237; *Pugh v. Sample* (1909), 123 La. 791, 49 South. 526, 39 L. R. A. (N. S.) 834; *Capitol Nat. Bank v. Holmes* (1908), 43 Colo. 154, 95 Pac. 314, 127 Am. St. 108, 16 L. R. A. (N. S.) 470; 2 Pomeroy, Eq. Jurisp. §§798, 1212. The intention to preserve the lien is clearly expressed in the deed. It is also averred that the property was not worth more than the amount of the mortgage debt. The mechanic's lien was junior to the mortgage. Appellee's security was not lessened by the transfer of the legal title, and on equitable principles it would seem that the lien of the mortgage should be preserved for the benefit of the grantee in the deed.

Both appellants and appellee have cited authority that apparently gives support to their contentions. On slightly varying facts decisions may be found tending to support both views. But the case of *Coburn v. Stephens, supra*, removes all doubt as to the rule that should apply here. The issues, facts and circumstances are identical in every essential element with the case at bar. The Supreme Court held that the holder of a mortgage who acquired the legal title to the mortgaged premises, upon which a mechanic's lien had been acquired subsequent to the execution of the mortgage, was entitled to preserve the mortgage lien for his protection against such lien, and that the lien of his mortgage was not merged in the legal title. We therefore hold that the trial court erred in sustaining the demurrers to each of the paragraphs of answer. The judgment is reversed with instructions to overrule the demurrers to each of the paragraphs of answer, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 108 N. E. 373. Merger in the case of a mortgage, see 99 Am. St. 160. Merger of estates as dependent upon intention of parties, see 7 Ann. Cas. 700. Assent of creditor as essential to novation by substitution of debtor, see Ann. Cas. 1914 A 339.

Bronnenberg v. Indiana Union Traction Co.—59 Ind. App. 495.

See, also, under (1) 27 Cyc. 1171; (2) 16 Cyc. 665; 27 Cyc. 1377, 1381; (3) 27 Cyc. 1377; (4) 27 Cyc. 1378, 1417; (5) 27 Cyc. 1379; (6) 27 Cyc. 1381.

BRONNENBERG ET AL. v. INDIANA UNION TRACTION COMPANY ET AL.

[No. 9,100. Filed October 8, 1915.]

1. **TRIAL.—Inferences from Facts Proved.—Evidence.—Sufficiency.**—It is not essential that a fact be proved by direct or positive evidence, since the court or jury may draw any reasonable inference of fact from the evidence, and it is sufficient if the inference may reasonably be drawn from facts and circumstances which the evidence tends to establish. p. 498.
2. **APPEAL.—Review.—Findings.—Conclusiveness.**—The finding of the trial court that a certain defendant received notice of plaintiff's election to purchase certain property pursuant to an option thereon, was conclusive where there was not a total failure of evidence to prove such notice. p. 499.
3. **SPECIFIC PERFORMANCE.—Contract to Sell Real Estate.—Tenants in Common.—Notice.—Sufficiency.**—In a suit against tenants in common for the specific performance of a contract to convey, where it was conceded that there was a tender and demand made on one of the defendants, the notice was sufficient to sustain a decree even though there was no evidence of a similar tender or demand as to the other defendants, since where tenants in common are jointly pursuing a common purpose of selling, leasing, or managing their real estate, notice to one in matters pertaining thereto is notice to all. p. 499.
4. **SPECIFIC PERFORMANCE.—Conditions Precedent.—Necessity for Notice or Demand.—Tender.**—Notice or demand to convey and a tender of the purchase price is not required as a condition precedent to a suit for specific performance of a contract for the sale of real estate, where the vendor evinces an intention not to perform and denies the right of the purchaser to enforce the conveyance in pursuance to such contract. p. 499.
5. **APPEAL.—Review.—Decree.—Failure to Provide Interest.**—Appellants are not entitled to a reversal of a decree for the specific performance of a contract to sell real estate, for failure to provide for the payment of interest, where no motion was made to modify the decree in that respect, and especially where it does not appear that their failure to receive the money from the purchaser was due to any fault of the latter, or that the purchaser used the money or derived any benefit from it. p. 500.

Bronnenberg v. Indiana Union Traction Co.—59 Ind. App. 495.

6. **APPEAL.—Review.—Parties.—Change of Names.**—Appellants from a decree for specific performance to convey were not deprived of any substantial right by the fact that after suit was commenced plaintiff railroad company was consolidated with another, and the consequent change of names, where the real party, in interest continued to prosecute the suit to final judgment and on appeal. p. 500.
7. **APPEAL.—Review.—Affirmance.**—Where the case seems to have been fairly tried on the merits, resulting in substantial justice between the parties, the judgment will be affirmed. p. 500.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Suit for specific performance by the Indiana Union Traction Company against Calvin A. Bronnenberg and others. From the decree, the defendants Calvin A. and Susan Bronnenberg appeal. *Affirmed.*

Ellis & Ellison and *Joseph A. Roberts*, for appellants.
Kittinger & Diven, for appellees.

FELT, J.—This suit was instituted by appellee, Indiana Union Traction Company, against the appellants and the appellees, Ransom Bronnenberg, Sarah Bronnenberg and Anderson Trust Company, to enforce specific performance of a written contract, for the sale of real estate, alleged to have been entered into by Calvin A., Ransom and Susan T. Bronnenberg, brothers and sister, who owned the real estate in equal shares as tenants in common. The complaint was in two paragraphs in which it was alleged in substance that said owners, on June 3, 1905, leased to Indiana Union Traction Company, 40 acres of real estate in Madison County, Indiana, known as "The Mounds" for ten years at an annual rental of \$500, with the option of purchasing the land at \$300 per acre provided the option was exercised within five years; that within five years the traction company notified said owners that it intended to purchase the real estate and performed all the conditions on its part to be performed to complete the purchase.

Ransom Bronnenberg filed a cross-complaint against appellees and his coparties to the contract, in which he alleged

his willingness to perform the contract and demanded specific performance thereof and payment to him of one-third the purchase money. The Anderson Trust Company filed an answer in which it admitted the allegations of the complaint, that it had agreed with the traction company to take the title to the real estate as trustees in pursuance of the provisions of the contract, and offered to abide the order and judgment of the court. The case was tried on issues formed by an answer of general denial to the complaint and also to the cross-complaint.

While the litigation was pending the plaintiff filed a supplemental complaint in which it alleged that the Indiana Union Traction Company had consolidated with another like corporation under the name of "Union Traction Company of Indiana" and that the latter company succeeded to the rights of the Indiana Union Traction Company and was ready and willing to pay for the land the contract price and demanded that the contract be specifically enforced.

The court made a special finding of facts and stated its conclusions of law thereon in favor of the traction company, that the contract be specifically performed by the appellants. Thereupon the court rendered judgment in substance that Calvin A. and Susan T. Bronnenberg each within thirty-three days execute to the "Anderson Trust Company as trustee herein for the Union Traction Company of Indiana, substituted plaintiff, their deed with full covenants of warranty" for said real estate which is specifically described; that such deed be delivered to the clerk of the court to be delivered to said grantee within said time on payment of \$4,000 for each of said grantors, and also decreed the execution of a like deed by Ransom Bronnenberg on payment into court for his use and benefit of \$4,000 with 6 per cent interest from September 29, 1910, the date on which he made tender of performance on his part. The court also appointed a commissioner to execute deeds to carry into effect the decree in

the event the parties failed to do so within the specified time.

The appellants excepted to the judgment. The record shows that the Union Traction Company of Indiana complied with the decree and brought the requisite amount of money into court to pay for the land and thereupon appellants prayed and were granted an appeal to the Supreme Court, from which court the case was transferred to the Appellate Court for want of jurisdiction. The appellants, Calvin A. and Susan T. Bronnenberg, each separately assign as error that (1) the court erred in each conclusion of law and (2) in overruling the separate motion of each appellant for a new trial.

The court found that each of the parties to the contract received notice within the specified time of the election of the traction company to purchase the property and that prior to the commencement of the suit Ransom Bronnenberg and Sarah, his wife, performed all the conditions of the contract by them to be performed to complete the purchase of the real estate. Appellants contend that there is no evidence to sustain the court's finding that Susan T. Bronnenberg received any notice of the election of the traction company to purchase the property in pursuance of its option; that the contract is joint and can not be enforced separately against each of the owners of the real estate; that the judgment is erroneous in ordering a conveyance to "Union Traction Company of Indiana" instead of the plaintiff to the suit, Indiana Union Traction Company; that in any event the judgment is erroneous for failure to provide for interest from date of the decree.

The court or jury trying a case may draw any reasonable inference of fact from the evidence. It is not essential that

a fact be proven by direct or positive evidence, and

1. where it may reasonably be inferred from facts and circumstances which the evidence tends to establish

Bronnenberg v. Indiana Union Traction Co.—59 Ind. App. 495.

it will be sufficient on appeal. *Hedrick v. D. M.*
2. *Osborne & Co.* (1884), 99 Ind. 143, 147. There is not a total failure of evidence to prove notice to appellant, Susan T. Bronnenberg. Furthermore where
3. tenants in common are jointly pursuing the common purpose of selling, leasing or managing their real estate, notice to one in matters pertaining to such transactions is notice to all. *Neff v. Elder* (1907), 84 Ark. 277, 105 S. W. 260, 262, 120 Am. St. 67; *Steele v. Robertson* (1905), 75 Ark. 228, 87 S. W. 117, 118; *Ward v. Warren* (1880), 82 N. Y. 265, 269; *Miner v. Lorman* (1888), 70 Mich. 173, 38 N. W. 18, 19; *Grossman v. Lauber* (1868), 29 Ind. 618, 621; *Clifford v. Meyer* (1893), 6 Ind. App. 633, 638, 34 N. E. 23; 38 Cyc. 106. It is not denied that appellant, Calvin A. Bronnenberg, had notice, that tender was made to him and demand made upon him to execute the contract of sale. Therefore independent of the question of proof of notice to Susan T. Bronnenberg of the traction company's election to purchase the real estate on the terms specified in the contract, the notice was sufficient for the specific performance of the contract.

Appellees contend that the evidence shows that Susan T. Bronnenberg concealed herself to avoid service of notice upon her, and the making of a tender of the purchase

4. money to her personally, and a demand upon her for a conveyance of the land. Be this as it may, it appears from her testimony that she did not at any time intend to execute the contract of sale and denied the right of the traction company to enforce the conveyance of the real estate in pursuance of the contract. In this situation further notice or demand would have been unavailing and a useless ceremony which the law under such circumstances does not require as a condition precedent to the institution of a suit to enforce specific performance of a contract to convey real estate. *Jordan v. Johnson* (1912), 50 Ind. App. 213, 219,

Bronnenberg v. Indiana Union Traction Co.—59 Ind. App. 495.

98 N. E. 143; *Harshman v. Mitchell* (1889), 117 Ind. 312, 20 N. E. 228; *Burns v. Fox* (1888), 113 Ind. 205, 14 N. E. 541.

On the record before us appellants are not entitled to a reversal because the decree does not provide for interest. If the judgment rendered is right in other respects the

5. remedy of appellants was by motion to modify the decree so as to provide for interest. No such motion was made. *Jarrell v. Brubaker* (1898), 150 Ind. 260, 271, 49 N. E. 1050; *Gwynn v. Wabash, etc., Trust Co.* (1913), 53 Ind. App. 391, 396, 101 N. E. 738; *Sahm v. State, ex rel.* (1909), 172 Ind. 237, 246, 88 N. E. 257; *Warrick v. Spry* (1912), 49 Ind. App. 327, 332, 97 N. E. 361. Furthermore it does not affirmatively appear that the company has used the money or derived any benefit from it. In any event to obtain relief on the question of interest it devolves on appellants to show such use, and failing so to do they can not complain that they were not allowed interest. They refused the purchase money when tendered and their failure to receive then or after the rendition of the decree is not due to any fault of appellees. *Hunter v. Bales* (1865), 24 Ind. 299, 304; *Cheney v. Libby* (1890), 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818, 825; *Fall v. Hazelrigg* (1874), 45 Ind. 576, 579, 15 Am. Rep. 278.

Appellants have not been deprived of any substantial right by the consolidation of the corporations or the change of names shown by the record. The real party in inter-

6. est continued to prosecute the suit to final judgment and on appeal. The numerous complaints made by appellants fail to show that they have been deprived

7. of any substantial right by any of the alleged errors or irregularities. The case seems to have been fairly tried on the merits and substantial justice seems to have been done between the parties. No reversible error is shown. §§407, 700 Burns 1914, §§398, 658 R. S. 1881; *First Nat.*

Lamar v. Farmer—59 Ind. App. 501.

Bank v. Ransford (1913), 55 Ind. App. 663, 669, 104 N. E. 604, and cases cited. Judgment affirmed.

NOTE.—Reported in 109 N. E. 784. Sufficiency and effect of tender, see 77 Am. Dec. 470; 30 Am. St. 460. See, also, under (1) 17 Cyc. 820; 38 Cyc. 1517; (2) 3 Cyc. 360; (3) 36 Cyc. 704; (4) 36 Cyc. 705; (5) 3 C. J. 695; 2 Cyc. 670; (7) 3 Cyc. 418.

LAMAR v. FARMER.

[No. 8,641. Filed October 8, 1915.]

MINES AND MINERALS.—Oil and Gas Leases.—Construction.—Forfeiture.—Rights to Rentals.—Under an oil and gas lease providing that lessee should commence a well within ninety days, or pay lessor twenty-five cents per acre at the end of each three months thereafter, or forfeit the lease, that completion of the well should liquidate all rentals for the remainder of the term, and that lessee might at any time reassign to the lessor, paying all rentals to date of reassignment, the forfeiture clause was for the exclusive benefit of the lessor, so that on failure of the lessee to drill a well, or pay the rental, or reassign the lease, the lessor could either declare the lease forfeited or sue for the rentals due thereunder. (*Butcher v. Greene* [1912], 50 Ind. App. 692, distinguished.)

From Warrick Circuit Court; *Ralph E. Roberts*, Judge.

Action by William J. Lamar against Ira J. Farmer. From a judgment for defendant, the plaintiff appeals. *Reversed.*

S. B. Hatfield, H. F. Fulling and *W. S. Hatfield*, for appellant.

L. A. Folsom, for appellee.

IBACH, P. J.—This appeal presents only the sufficiency of appellant's amended complaint to withstand appellee's demurrer for want of facts. This complaint is for the collection of unpaid rentals on two identical gas and oil leases. The determination of the question presented involves the construction of the following clauses of the oil leases:

"5th. Second party agrees to commence a well on these premises within ninety days from date, or pay first party twenty-five cents per acre at the end of each three months thereafter at the Dale Bank of Dale, Ind., or forfeit this lease, and the completion of such well shall be a full liquidation of all rentals during the remainder of the term of this lease. 6th. Second parties may at any time, upon the payment of one dollar, re-assign this lease to the first party and be released from all conditions herein contained, but should any rentals be due at any time, same shall be paid to date of re-assignment."

Appellant contends that since appellee, the lessee, did not commence a well on his premises, and did not pay appellant twenty-five cents per acre at the end of each three months as required by said lease, and paid nothing under the lease, and as appellant had not declared the lease forfeited, there is due him under the lease twenty-five cents per acre for each three months from the date of the lease to the time of filing the complaint. His contention is that the provision for forfeiture is solely for the benefit of the lessor, and the lessee can not escape liability for rent merely by failing to dig wells. This conclusion is supported by the cases of *Hancock v. Diamond Plate Glass Co.* (1904), 162 Ind. 146, 70 N. E. 149; and *Risch v. Burch* (1911), 175 Ind. 621, 95 N. E. 123.

Appellee relies on the case of *Butcher v. Greene* (1912), 50 Ind. App. 692, 98 N. E. 876, in which, on the authority of *Brooks v. Kunkle* (1900), 24 Ind. App. 624, 57 N. E. 260, it was held that where a lease provided that in case no well was completed by a certain date, the grant should become null and void, unless the second party should pay a specified rental for each month completion was delayed, a failure to either complete the well or pay the rent is a breach of the condition automatically working a forfeiture of the lease. Appellee argues that the language used in the leases involved in the present case, "or forfeit this lease", is the equivalent of the language "this grant shall become null and void",

used in the lease involved in the case of *Butcher v. Greene, supra*, and that in the present case, on the failure of the lessee either to commence a well, or to pay rent, the lease automatically, *ipso facto*, became forfeited.

We do not agree with appellee that the condition stated in clause 5 of the lease, "or forfeit this lease", means that the lease shall become null and void, without some act of the lessor in so declaring it. By clause 6 the lessee might at any time reassign the lease, and pay one dollar and the rentals then due, and be freed from all its conditions. This provision was clearly inserted for the benefit of the lessee, and it seems to us that the conditions in clause 5 were for the benefit of the lessor, and upon the failure of the lessee to commence a well within the stated time, or pay the specified rents or reassign the lease according to its terms, the lessor might at his option declare the lease forfeited, or sue for the rentals under the lease. Thornton, Oil and Gas (2d ed.) §§155, 238, 240, and cases cited.

It was said by the Supreme Court in the very similar case of *Hancock v. Diamond Plate Glass Co., supra*, "The promise to pay for what it received from the appellants was the covenant of the appellee, made for the sole benefit of appellants * * *. A promise to pay can not be fulfilled by a failure to pay. Performance can not be effected by nonperformance, nor a covenant satisfied by sixty days' default. * * * In cases like this, and where it is not expressly provided that either party, or that the covenantor shall have the right, it has been uniformly held, so far as we have observed, that the right of forfeiture may be exercised by the covenantee, and not by the covenantor. Such a provision is made for the security of the one who is to be benefited by a fulfillment of the promise, and not for the benefit of the one whose interest lies in nonfulfillment. Such contracts are construed to mean that upon failure of the operator to pay the well rental, or the promised sum for delay in beginning operations, the landowner may elect to put an end to the contract

and recover what is due him, or he may waive his right of forfeiture and allow the contract to run, and enforce payments as provided in that instrument. An operator will not be allowed to set up his own default or wrong in discharge of his obligation to a landowner to pay for what he has bought. There is no doubt but an operator may be relieved of his obligation to put down a well, or to pay the sum promised for his failure, upon such terms as may be agreed upon in the contract, either of benefit to the landowner, or of inconvenience to himself; but a naked default or nonperformance, such as is set up in this case, can not be held to discharge his obligation." This case was quoted with approval by the Supreme Court in the later case of *Kokomo Nat. Gas, etc., Co. v. Matlock* (1912), 177 Ind. 225, 97 N. E. 787, 39 L. R. A. (N. S.) 675, and the court said, "As long as said contract was in force, appellant had the right to enter on said land and prospect for natural gas and oil, and it is liable for the compensation fixed in said contract for such right, to the date said lease was cancelled."

The complaint was sufficient, and the court erred in sustaining a demurrer thereto.

The death of appellee since the submission of this case having been suggested to the court, the judgment is reversed as of date of submission. Judgment reversed.

NOTE.—Reported in 109 N. E. 791. As to forfeiture of lease for breach of condition, see 26 Am. St. 910. As to liability for rent on oil and gas lease, see 33 L. R. A. 847. As to effect of alternative provision for rent in oil and gas lease, see 31 L. R. A. 674. On liability of lessee in oil or gas lease under provision for rent in event of failure or delay in developing premises, see 44 L. R. A. (N. S.) 50. On the rights of parties to oil or gas lease forfeited for default in payment to be made in lieu of development, see 43 L. R. A. (N. S.) 487. See, also, 27 Cyc. 734, 736.

BLAIR BAKER HORSE COMPANY v. RAILROAD TRANSFER COMPANY.

[No. 8,427. Filed March 25, 1915. Rehearing denied June 2, 1915
Transfer denied October 8, 1915.]

1. **APPEAL.—Review.—Ruling on Demurrer.—Memorandum.—Sufficiency.**—In an action for breach of warranty in the sale of a horse, a memorandum of defects accompanying a demurrer to the complaint, stating that the complaint shows no such warranty as under the facts would make defendant liable, that it does not show that plaintiff has done the things required of it in the premises, and that it shows no facts disclosing any liability on the part of defendant on account of any alleged warranty, was insufficient to enlighten the court as to the specific objections urged to the complaint, and hence the overruling of the demurrer was not error. p. 507.
2. **APPEAL.—Review.—Verdict.—Conclusiveness.**—A verdict can not be disturbed on the ground of insufficient evidence where it appears that there was evidence to support it upon every material question. p. 509.
3. **APPEAL.—Review.—Verdict.—Entry of Remittitur.—Overruling Motion for New Trial.**—In an action for breach of warranty in the sale of a horse, where it appeared that the animal was purchased for \$147.50, that it was returned as not as represented, and sold for \$13, a verdict for \$175 was returned for plaintiff on a complaint averring no special damages, whereupon plaintiff remitted \$27.50 and judgment was entered for \$147.50, and that thereafter the court directed an additional remittitur of \$13, with the alternative that plaintiff suffer a new trial, and that the additional remittitur was made, the original judgment set aside, and a new judgment entered for \$134.50, there was no error in permitting the first remittitur or in directing the second, since if the cause had come to the court on appeal with an excessive judgment a remittitur could properly have been ordered. p. 509.
4. **TRIAL.—Verdict.—Excessiveness.—Contrary to Law.**—A verdict for an amount in excess of that which may be legally recovered is not contrary to law where a remittitur of the excess may be directed. p. 511.
5. **TRIAL.—Excessive Verdict.—Directing Remittitur.**—In an action for damages where the jury has returned an excessive verdict and there is no dispute as to what the amount should be, the liability being fixed, the trial court may direct a remittitur, and such action will not be deemed an invasion of the province of the jury, but will be upheld on the theory that the excess arose either

Blair Baker Horse Co. v. Railroad Transfer Co.—59 Ind. App. 505.

from an error of law or mistake in computation, or from a misapprehension of the facts, and that the error does not permeate the entire verdict. p. 511.

6. **SALES.—Action for Breach of Warranty.—Instructions.—Assumption of Facts.**—In an action for breach of warranty in the sale of a horse, an instruction that if the jury found from a preponderance of the evidence, that plaintiff was entitled to recover, it was then its duty to assess the amount of the damages not exceeding the amount demanded, and that the measure of damages, if it was found that plaintiff was entitled to recover, would be the difference between the fair cash value of the animal at the time and place of sale, if in the condition as warranted, and the fair cash value of the animal as it really existed, was not, when considered as a whole, fatal on the objection that it assumed the existence of a warranty and was therefore misleading. pp. 511, 512.
7. **TRIAL.—Instructions.—Duty of Court and Jury.**—The court's instructions should state the law clearly and the language should be free from doubt and ambiguities so that the jury may be aided in applying the law to the facts, and it is the duty of the jury to accept and apply the law as stated by the court to the facts which it is the duty of the jury to find. p. 512.

From Superior Court of Marion County (85,898) ; *Charles J. Orbison*, Judge.

Action by the Railroad Transfer Company against the Blair Baker Horse Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Elmer E. Stevenson, for appellant.

Carl E. Wood, for appellee.

SHEA, J.—Appellee brought this action against appellant for damages on account of an alleged breach of warranty in the sale of a horse. The fourth paragraph of complaint, upon which the cause was tried, contains substantially the following allegations: that appellant and appellee are corporations under the laws of Indiana; that appellant is engaged in operating a horse market in the city of Indianapolis, buying and selling horses both on its own account and on commission; that appellee is engaged in the transfer business in said city, hauling and transferring all kinds of freight, and was desirous of purchasing a horse for use in

Blair Baker Horse Co. v. Railroad Transfer Co —59 Ind. App. 505.

its business, of which facts appellant had knowledge; that on September 13, 1911, appellant, through its auctioneer sold to appellee at public auction a certain bay mare; that said mare was not owned by appellant, and the owner of same was unknown to appellee at the time of purchase; that appellant warranted and represented the mare to be in all respects perfectly sound, healthy and a good worker; that appellee relied upon said warranty and representations and purchased the mare at a price of \$147.50; that the mare at the time of purchase and at the time the warranty and representations were made was not sound and healthy, and a good worker, but diseased and had cerebral hemorrhage or apoplexy, and was what is known as a dummy, by reason of which she was not worth anything; that if the mare had been sound she would have been worth \$147.50 the amount paid for her. Damages in the sum of \$200 were demanded, but no special damages were alleged.

The court overruled a demurrer to this paragraph of complaint. There was a trial by jury and a verdict in favor of appellee for \$175 on April 16, 1912. On April 17, 1912, appellee filed a remittitur of \$27.50, and on the same day the court rendered judgment in favor of appellee for \$147.50. On April 25, 1912, appellant filed its motion for a new trial. On argument the court announced a new trial would be granted unless an additional remittitur of \$13 should be made by appellee. Upon appellee's compliance with this condition the court set aside the former judgment and rendered judgment in appellee's favor for \$134.50, overruling appellant's motion for a new trial.

The first question presented and argued by appellant is the alleged error of the court in overruling the demurrer

for want of facts to the fourth paragraph of complaint on which the cause was tried. The case was filed subsequent to the taking effect of the act of 1911 (Acts 1911 p. 145, §344 Burns 1914, subd. 6), which requires that a memorandum be filed with a demurrer stating

Blair Baker Horse Co. v. Railroad Transfer Co.—59 Ind. App. 505.

wherein such pleading is "insufficient for want of facts, and the parties (party) so demurring shall be deemed to have waived his right thereafter to question the same for any defect not so specified in such memorandum." The memorandum filed with the demurrer in this case is as follows: "First. The averments of the fourth paragraph of the complaint do not show such a warranty as under the facts alleged would make this defendant liable to the plaintiff. Second. The averments of the fourth paragraph of the complaint do not show that the plaintiff has done the things required of it in the premises. Third. The averments of the fourth paragraph of the complaint do not show facts disclosing any liability on the part of the defendant on account of any alleged warranty."

It is very strenuously urged by appellee's counsel that no question is presented by this demurrer for the reason that the memorandum is too general in its terms, and therefore did not enlighten the court as to any specific defects in the complaint. This court has recently considered the question here presented in the case of *Stiles v. Hasler* (1914), 56 Ind. App. 88, 104 N. E. 878, and in passing upon a question somewhat similar to the one presented here, used this language: "Both the history of the passage of such act and its language necessitate the conclusion that by it the legislature intended to require that such memorandum should point out in clear, explicit and unambiguous language each particular insufficiency of the pleading demurred to, on which the demurring party relies; and, to permit him to cover up or conceal from the trial court by ambiguous or uncertain language or phraseology the objection intended to be urged and relied on in the appellate tribunal would be to defeat the intent and purpose of the law and make it a weapon by which appellate procedure would be complicated rather than simplified. *State, ex rel. v. Bartholomew* (1911), 176 Ind. 192, 95 N. E. 417 [Ann. Cas. 1914 B 91]." Measured by the standard therein set out, the memorandum is

Blair Baker Horse Co. v. Railroad Transfer Co.—59 Ind. App. 505.

insufficient to enlighten the court as to the specific objections urged to the complaint. *City of Bloomington v. Citizens Nat. Bank* (1914), 56 Ind. App. 446, 105 N. E. 575; *Live Stock Ins. Assn. v. Edgar* (1914), 56 Ind. App. 489, 105 N. E. 641; §348 Burns 1914, Acts 1911 p. 415. It follows that no error was committed in overruling the demurrer to the complaint.

The next error presented is the overruling of appellant's motion for a new trial, in support of which it is insisted that the verdict is not sustained by sufficient evidence,

2. and is contrary to law. A careful examination of the evidence as set out in the briefs of counsel shows that there was evidence upon every material question supporting the verdict of the jury. This is not seriously controverted by appellant. Under such circumstances this court can not disturb the verdict.

The jury returned a verdict for \$175. The evidence shows that the purchase price of the mare, which was sold at public auction in appellant's stockyards was \$147.50, but

3. the demand in the complaint was for \$200. No special damages were alleged. At the close of the trial appellee's counsel remitted \$27.50. Judgment was thereupon entered for \$147.50. Subsequently, after argument on motion for a new trial the court required appellee to remit an additional \$13 with the alternative that he suffer a new trial, whereupon the original judgment was set aside with appellee's consent and judgment was entered for \$134.50. This was evidently upon the theory that the horse having been returned to appellant was sold for the sum of \$13, thus tending to fix the value.

It is very earnestly argued that the court had no authority to permit the first remittitur, or to require the remittitur in the second instance, on the theory that there was no legal measure of damages. A careful examination of the evidence discloses that there was no conflict with respect to the amount of damages finally awarded, if appellee was entitled to re-

Blair Baker Horse Co. v. Railroad Transfer Co.—59 Ind. App. 505.

cover at all. The remittitur of \$27.50 in the first instance covered the difference between the purchase price and the amount of the verdict as rendered by the jury. The remittitur of the additional \$13 covered the difference between the purchase price and the amount for which the horse subsequently sold, the proceeds of which were paid to appellee. There was no evidence of the value of the horse so far as we have been able to discover except the statement of Mr. McFarland, president of appellee company, who stated that the mare would have been worth \$147.50 if she had been as represented, but in the condition she was actually in she was worth nothing. The only conflicting evidence with respect to this point, if it may be said to be evidence, is the circumstance of the sale of the horse for \$13. The trial court evidently considered this a sufficient item of evidence to show some conflict with the statements of the witness as to the value of the animal to the extent of \$13. If the horse would sell upon the market for \$13, that would evidently fix its value at \$13, as the measure of value is determined by what the specific thing will bring in the open market where there is free and fair competition with a seller who is willing to sell and a buyer who is willing and able to purchase. The difference between the value of the horse in this case after return to appellant as shown by the evidence, and the price at which it was originally sold to appellee would strongly tend to fix the amount of appellee's damages, so that we think no error was committed by the trial court in granting the remittitur in the first instance and in requiring the remittitur in the second instance. The amount for which the judgment was finally rendered is undisputed, once the question of liability is conceded, and that was a question properly submitted to and decided by the jury. Appellant seeks to distinguish the case of *Cleveland, etc., R. Co. v. Beckett* (1895), 11 Ind. App. 547, 39 N. E. 429, and the case of *Evansville, etc., Traction Co. v. Broermann* (1907), 40 Ind. App. 47, 89 N. E. 72, from the present case, but the distinc-

Blair Baker Horse Co. v. Railroad Transfer Co.—59 Ind. App. 505.

tion sought to be made is not essential. If the cause had come to this court with an excessive judgment, a remittitur might properly be ordered. *First Nat. Bank v. Peck* (1913), 180 Ind. 649, 103 N. E. 643; 3 Cyc. 435; *Phillips v. Nicholas* (1832), 3 Blackf. 133; *Devore v. McDermitt* (1874), 47 Ind. 234; *Hill v. Newman* (1874), 47 Ind. 187.

This likewise disposes of the able argument of appellant's learned counsel that the verdict of the jury is contrary to law. *Arkansas Valley, etc., Co. v. Mann* (1889), 130

4. U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; *Hale, Damages* 235; 1 *Sutherland, Damages* (2d ed.) §460; 18 *Ency. Pl. and Pr.* 123, *et seq.*

There is some conflict in the decided cases upon the right of the trial court to direct a remittitur under the facts as disclosed in this case, upon the theory that it is an

5. invasion of the province of the jury, but the great weight of authority, both of the text writers and decided cases is in harmony with the rule as applied here. This power of the trial court is sanctioned on the theory that the excess arises either from an error of law or mistake in computation, or of a misapprehension of facts, and that such error does not permeate the entire verdict, and may, therefore, be corrected and thus avoid expensive litigation and unnecessary delay. *Dobenspeck v. Armel* (1857), 11 Ind. 31; *Hale, Damages* 235; 3 Cyc. 432, and cases cited; *Carmichael v. Shiel* (1863), 21 Ind. 66; *Tucker v. Hyatt* (1898), 151 Ind. 332, 337, 51 N. E. 469, 44 L. R. A. 129; 28 *Am. and Eng. Ency. Law* 309, and cases cited; *Sedgwick, Damages* (6th ed.) 765, note 3; 3 *Graham & Waterman, New Trials* 1162; *Arkansas, etc., Cattle Co. v. Mann, supra*.

The next question presented and argued is the alleged error of the court in giving instruction No. 17 over appellant's objection. Instruction No. 17 reads as follows:

6. "If you find from a preponderance of the evidence that plaintiff is entitled to recover in this action, it will then be your duty to assess the amount of its damages

not exceeding the amount demanded; the measure of plaintiff's damages in this case, if you find it is entitled to recover, would be the difference between the fair cash value of the bay mare in question at the time and place of sale, if said bay mare was in the condition as warranted, and the fair cash value of said bay mare at the time and place of sale, as said bay mare really existed." The specific objection to this instruction is to the language: "If said bay mare was in the condition as warranted." It is very earnestly insisted that this was an unwarranted assumption on the part of the court of the existence of a warranty on the part of appellant, and was therefore misleading and harmful.

It is important in all cases that an instruction given

7. by the court upon the measure of damages, as well as upon all other questions, should state the law clearly. The language should be free from doubt and ambiguities in order that the jury may be aided in applying the law as given by the court to the facts. It is the duty of the jury to accept and apply the law thus charged by the court to the facts which it is the duty of the jury to find. The line of demarcation between the duty of the trial court and the jury is thus clearly defined. In charging the jury the court should not assume a fact proven about which there is

6. a conflict in the evidence. The language of this instruction objected to, when taken from its context, is subject to criticism, but the jury is in effect instructed in the first part of this charge that it must first determine by a preponderance of the evidence whether the defendant was liable before damages should be assessed. In reaching a conclusion upon the question of liability, the jury must of necessity have settled the question of warranty, so that this instruction, when fairly considered as a whole, and as given to the jury, presents no error which warrants this court in reversing this case. Judgment affirmed.

NOTE.—Reported in 108 N. E. 246. As to what constitutes warranty, see 94 Am. St. 209. On the power of appellate court to in-

Indiana Union Traction Co. v. Cauldwell—59 Ind. App. 513.

terfere with verdict for excessive damages, see 26 L. R. A. 384. As to power of trial court to cure an excessive verdict by requiring or permitting a reduction when true measure of damages is not ascertainable by mere computation, see 39 L. R. A. (N. S.) 1064. Remittitur, when excessive verdict is granted through passion or prejudice, see Ann. Cas. 1912 C 500. See, also, under (1) 31 Cyc. 315; (2) 3 Cyc. 348; (3) 3 Cyc. 382; 29 Cyc. 1022; (4) 29 Cyc. 954; (5) 29 Cyc. 1020, 1022; (6) 35 Cyc. 483, 484; (7) 38 Cyc. 1594.

INDIANA UNION TRACTION COMPANY v. CAULDWELL.

[No. 8,428. Filed February 12, 1915. Rehearing denied May 26, 1915. Transfer denied October 8, 1915.]

1. **NEW TRIAL.**—*Grounds.*—That the verdict of the jury is contrary to the evidence is not ground for a new trial. p. 515.
2. **APPEAL.**—*Waiver of Error.*—*Briefs.*—Alleged error in overruling a motion for new trial is waived as to causes therein assigned which are not supported by any point or proposition in appellant's brief. p. 515.
3. **STREET RAILROADS.**—*Crossing Accidents.*—*Negligence.*—*Presumptions.*—*Instructions.*—Where a traveler is injured by a car at a public street crossing there is no presumption, in the absence of evidence, either for or against negligence, and the rule applicable to the crossings of steam roads generally is not applicable to an interurban road at a crossing in an incorporated town; hence, in an action against an interurban railroad company, an instruction stating the reverse of such propositions, and susceptible to the interpretation that plaintiff was guilty of contributory negligence as a matter of law if he did not see the car that struck him in time to avoid the injury, was properly refused. p. 515.
4. **STREET RAILROADS.**—*Crossing Accidents.*—*Instructions.*—In an action for injuries sustained in colliding with an interurban car at a street crossing, an instruction that if it was found that plaintiff attempted to cross the track in front of defendant's car, and that prior to such attempt, if any, he saw the car approaching, the mere fact that at the time of his attempt to cross he could see it approaching would not in itself establish contributory negligence, and that in order to establish contributory negligence the car must have been approaching in such close proximity to plaintiff, that taking into account the rate of speed allowed by ordinance, if there was such ordinance in force, and under the then present condition of the apparent rate of speed, a reasonably prudent man would not attempt to cross the track, was not objectionable on

Indiana Union Traction Co. v. Caldwell—59 Ind. App. 513.

the ground that it in effect states that plaintiff could cross in front of a rapidly approaching car with impunity disregarding the evidence of his senses that the car was going so rapidly that it would inevitably hit him if he tried to cross, although it is not to be unqualifiedly approved and may be subject to other objections not raised. p. 516.

From Boone Circuit Court; *Willett H. Parr*, Judge.

Action by William Caldwell against the Indiana Union Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

M. A. Chipman, Kane & Kane and *James A. Van Osdol*, for appellant.

Hanna & Dailey, for appellee.

FELT, J.—This is an appeal from a judgment in damages for personal injuries received by appellee in a collision between one of appellant's cars and appellee's horse and buggy, which was being driven by him at a street crossing in the town of Fortville, Indiana. Appellant assigns as error the overruling of its demurrer to appellee's complaint and the overruling of its motion for a new trial.

The complaint is in one paragraph. The only objection pointed out by the memorandum accompanying the demurrer is that it "does not show that the defendant owed a duty to protect the plaintiff from injury, or that the injury to plaintiff resulted by reason of the failure of the defendant to perform any duty it owed to the plaintiff." The complaint charges in substance that the town of Fortville is incorporated; that the injury occurred at a street crossing within the corporate limits of the town; that an ordinance, which is set out in the complaint was in force limiting the rate of speed of any interurban car to six miles per hour; that appellant by its servants carelessly and negligently ran one of its cars at a high and dangerous rate of speed to wit, twenty-five or thirty miles per hour in violation of the ordinance and "carelessly, negligently and wrongfully" ran its car "into, upon, and against the buggy in which plain-

tiff was riding * * * pushing, rolling and dragging plaintiff * * * for a distance of one hundred feet." That as a result of said collision appellee was greatly bruised, and injured; that his injuries were received as the proximate result of said negligent acts of defendant's servants while acting in the scope of their employment, and without fault or negligence on the part of appellee. The complaint is not open to the objection urged against it and the demurrer was therefore properly overruled.

Four alleged grounds for new trial are set out in appellant's briefs as follows: (1) the verdict of the jury is contrary to law; (2) the verdict of the jury is contrary

1. to the evidence; (3) the court erred in refusing to give instruction No. 9 requested by appellant; and (4) the court erred in giving instruction No. 24 of
2. its own motion. The second alleged ground is not a cause for a new trial. *Jennings v. Ingle* (1905), 35 Ind. App. 153, 155, 73 N. E. 945. Appellant has stated no point or proposition relating to either the first or second cause for a new trial, and any error relating thereto is therefore waived. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 627, 103 N. E. 652.

The court refused to give instruction No. 9 requested by appellant. The refused instruction in effect told the jury there was a presumption of negligence against ap-

3. pellee arising from the collision, and it also applied the rule to an interurban road at the crossing in an incorporated town, that is applicable to the crossings of steam roads generally, whereas the rule in all its strictness is not applicable to such crossings. The instruction was also liable to be so interpreted by the jury as to mean that appellee was guilty of contributory negligence as a matter of law if he did not see the car that struck him in time to avoid the collision. "If a traveler is injured at a railway crossing, there is no presumption, in the absence of evidence, either for or against negligence. The traveler is not aided

Indiana Union Traction Co. v. Caldwell—59 Ind. App. 513.

by a presumption of freedom from fault, nor the railway by a presumption of contributory negligence." *Grand Trunk, etc., R. Co. v. Reynolds* (1911), 175 Ind. 161, 171, 92 N. E. 733, 93 N. E. 850. The court did not err in refusing the instruction. *Henry v. Epstein* (1912), 50 Ind. App. 660, 668, 95 N. E. 275; *Indianapolis St. R. Co. v. Schmidt* (1905), 35 Ind. App. 202, 206, 71 N. E. 663, 72 N. E. 478; *Brooks v. Muncie, etc., R. Co.* (1911), 176 Ind. 298, 304, 95 N. E. 1066; *Virgin v. Lake Erie, etc., R. Co.* (1915), 55 Ind. App. 216, 101 N. E. 500, and cases cited. Furthermore, in so far as the instruction refused embodied a correct principle of law, applicable to the case, it was substantially covered by instruction No. 15, given by the court on its own motion.

Instruction No. 24, objected to is as follows: "If you find from the evidence that plaintiff at the place in question attempted to cross the track of the defendant in front

4. of defendant's interurban car as it approached from the southwest, and if you further find that prior to the time of such attempt to cross, if there was such attempt, plaintiff saw said interurban car approaching on said track, then I instruct you that the mere fact that plaintiff at the time of his attempt to cross, could see said interurban car approaching on said track does not in itself establish his contributory negligence. In order to establish such contributory negligence the said interurban car must not only have been approaching plaintiff, but it must have been approaching and in such close proximity, that taking into account the rate of speed as allowed by said ordinance heretofore referred to, if you find there was such ordinance in force for such places and under the then present condition of the apparent rate of speed at which the said interurban car was traveling, a reasonably prudent man would not attempt to cross the track." Appellant objects to this instruction on the ground that "it tells the jury that plaintiff could cross in front of a rapidly approaching car with impunity disregarding the evidence of his senses that the car was going

Indiana Union Traction Co. v. Cauldwell—59 Ind. App. 513.

so rapidly it would inevitably hit him if he tried to cross and that he could recover even if he could have avoided it by stopping because the car was running faster than specified in the ordinance." The instruction is not well worded and could have been made more explicit and complete. No objection is made as to its incompleteness, nor was a more complete instruction on the subject tendered. It may possibly be subject to the criticism that the jury might understand from it that appellee could rely on the provisions of the ordinance after he had knowledge that the car was approaching at a rate of speed in excess of that authorized by the ordinance, but no objection of this kind is urged. Without giving an unqualified approval to the instruction, we hold that it is not subject to the objections urged against it and that it substantially states the law correctly as applied to the issues and facts of the case, and that appellant was not harmed by it. In the absence of any notice or knowledge that the car was being run at an unlawful rate of speed, appellee, while exercising reasonable and ordinary care for his own safety, could rely on the servants of appellant in charge of the car, running the same at a rate of speed authorized by the ordinance. *Louisville, etc., Traction Co. v. Lottich* (1915), *ante* 426, 106 N. E. 903; *Virgin v. Lake Erie, etc., R. Co., supra*. Finding no available error, the judgment is affirmed.

NOTE.—Reported in 107 N. E. 705. As to the right, duties and obligations of street railroad companies with regard to streets, see 25 Am. St. 475. As to injuries by street car collisions with vehicles or horses, see 25 L. R. A. 508. Operation of street railway cars in violation of municipal ordinance as negligence *per se*, see 9 Ann. Cas. 840; Ann. Cas. 1913 E 1100. See, also, under (1) 29 Cyc. 820; (2) 36 Cyc. 1533, 1535, 1584, 1641; (3) 36 Cyc. 1641.

Maffenbeier v. Koenig—59 Ind. App. 513.

MAFFENBEIER v. KOENIG ET AL.

[No. 8,506. Filed April 20, 1915. Rehearing denied June 22, 1915.
Transfer denied October 8, 1915.]

1. **JURY.—Competency of Juror.—Business Relation with Party.**—As a general rule a person sustaining a business relation with one of the parties calculated to influence his verdict is not competent to serve as a juror in a cause, but the mere fact that a juror was a member of an association to which one of the defendants belonged and which was engaged in operating a neighborhood threshing machine for the convenience of the members and not for profit, was not such a business relation as to require setting aside the verdict, the association being in no way involved in the litigation. pp. 520, 521, 522.
2. **JURY.—Selection of Jurors.—Voir Dire Examination.**—Great precaution should always be taken to prevent the acceptance of jurors who are not likely to be able to do justice between the parties, and to the end that fair trials may be secured, great latitude is granted in the examination of jurors touching their qualifications. p. 520.
3. **APPEAL.—Review.—Discretion.—Jury.**—The trial court is vested with large discretion in its decisions as to the competency of jurors, and it is only when it appears that such discretion has been abused that the court on appeal can interfere. p. 521.

From Spencer Circuit Court; *Henry F. Fulling*, Special Judge.

Action by Martin Maffenbeier against John Koenig and others. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

R. W. Armstrong and *J. W. Jeffries*, for appellant.

E. L. Boyd and *Arch Stevenson*, for appellees.

IBACH, J.—This was an action by appellant against appellees to set aside the release of a mortgage held by appellant on the lands of appellee John Koenig, which release, it was alleged, appellees had by fraud and misrepresentation procured from appellant, who was an old, feeble, infirm man, unable to understand any language save German. There was a trial by jury, a verdict for defendants and a judgment thereon.

Error is assigned in overruling appellant's motion for new trial, on the ground that one of the jurors, David Painter, was a partner in business with defendant John Koenig. Several affidavits were filed in support of this contention setting forth that David Painter was a close neighbor and warm friend of defendant John Koenig, in some of which it was stated generally that they were partners in business, in others that Painter was at the time of the trial and for several months before a partner in business with defendant in a certain threshing machine engine and separator. Appellees filed various counter affidavits showing that in August, 1910, ten persons organized themselves together and purchased one or more shares each of a face value of \$100 in what was known as the Haaf Company Machine, that each person subscribed for and purchased said interest in said machine as an individual, and with the understanding that he was not to become liable for the interest or share purchased by any other person, and that each subscriber was individually liable and not jointly liable for said shares in said company machine, or for the purchase price of said machine; that said organization was perfected by electing officers, who were to control and manage said machine; that the object and purpose of the organization and the purchase of said machine was for the particular purpose of threshing wheat, oats, etc., for the members of said company, and not with the intention of going into the threshing machine business for profit. The affidavit of David Painter in addition shows that he owned one share, that when he purchased his share he did not know that John Koenig was to purchase a share, that his purpose in purchasing a share was to have a threshing machine in his immediate neighborhood to care for his grain crops at the proper time and not be compelled to wait on other machines, and not for the purpose or intention of going into the threshing machine business for profit; that the control of the machine was in the officers of the company among whom John Koenig

was a director, and was not in affiant; that affiant when he was called on to try said cause knew nothing whatsoever about the merits of the controversy, neither had he talked with any of the parties, attorneys, or any other persons connected with said cause or discussed or expressed any opinion whatever concerning the merits of the cause, that the answers he gave to the court and the attorneys touching his qualifications as a juror in said cause were true. The affidavit of appellee Koenig shows in addition to the matter contained in the others generally, that he, when he entered the organization did not know that David Painter was to be a member; that the purpose which induced him to subscribe was to have a machine in his neighborhood to thresh his grain at the proper time and not have to wait for a machine; that he is acquainted with David Painter, and said Painter resides about two miles from affiant's home, but they have never visited each other, nor have their families ever visited each other.

It is argued by appellant that the relationship between appellee Koenig and the juror Painter was such as to deprive appellant of his constitutional right to a trial by an

1. impartial jury. See, *Block v. State* (1885), 100 Ind.

357. There is no real conflict in the principal statements contained in the affidavits produced by both parties. The question before us then is, Whether the relationship between members of an association operating a threshing machine, for the purpose of threshing wheat for the members of the company, and not for profit, is such a relationship that one member is incompetent to sit as a juror in a case in which another member is a party? The general rule is that a person is not competent to serve as a juror, where there exists any business relation between him and one of the parties calculated to influence his verdict. 24 Cyc. 276. We

are mindful of the fact that very great pains should

2. always be taken to prevent the acceptance of a juror whose state of mind is such that he is likely to be un-

able to do justice between the parties, and where such a prejudiced juror has been accepted and due care has been exercised in his examination as to his competency and his incompetency was not discovered until after the trial, trial courts should and generally do, set aside such verdict and grant a new trial. For the purpose of securing fair trials of all causes, great latitude is granted by the trial courts in the examination of all jurors who are being interrogated as to their fitness and competency, the purpose being to secure impartial and unbiased results from the jury finally accepted to try the cause. *Pearcy v. Michigan Mut. Life Ins. Co.* (1887), 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673, and cases cited.

Giving appellant the benefit of every statement contained in the affidavits, they fail to show a state of facts that would justify this court in interfering with the determina-

1. tion of the trial court on the question here involved.

The record fails to disclose any facts from which it might be said that the juror was prejudiced or biased as to either party or that he could have been in any manner interested in the result of the suit. It does not appear that he was in any manner interested in the debt sued for, financially or otherwise, or that he would be affected if the plaintiff recovered or failed in his action. No kindred relationship is shown and no business relations such as would disqualify the juror. Merely because the juror and the party to the action and other parties had purchased for their common use and not for profit a threshing machine, is at best a business relationship theoretic or imaginary in its character and is so remote and insignificant that it must be said to be wholly incapable of influencing the mind and conduct of the juror. If the contention of appellant be carried to its legitimate conclusion, we can conceive of many instances where

- it would absolutely prevent the trial of causes in the
3. counties where suits are instituted. Consequently a very large discretion must necessarily be given the trial

court in its decisions as to the competency of jurors, and it is only when it appears that such discretion has been abused than an appellate court can interfere. *Dolan v. State* (1890), 122 Ind. 141, 145, 23 N. E. 761; *Stephenson v. State* (1887), 110 Ind. 358, 362, 11 N. E. 360, 59 Am. Rep. 216; *Dill v. Lawrence* (1887), 109 Ind. 564, 10 N. E. 573, and cases cited; *Gershner v. Scott-Mayer, etc., Co.* (1910), 93 Ark. 301, 124 S. W. 772; *State, ex rel. v. Taylor* (1892), 5 Ind. App. 29, 31 N. E. 543.

Appellant relies mainly on the case of *Stumm v. Hummel* (1874), 39 Iowa 478, where it was held that the trial court did not err in sustaining a challenge for cause to a

1. juror who testified that he and the defendant were partners in a nursery and had been for three years, and he and the defendant had talked about the case. The court said, "The answer of the juror exhibited close business relations, which, experience shows, generally beget sentiments of friendship and confidence, warranting the conclusion of the existence of a state of mind favoring the party with whom such relations exist. In such a case the business of the copartnership might be affected by a verdict against the partner; certainly it might result in a necessity for the dissolution of the firm. The court may well have concluded that the juror exhibited such a state of mind as precluded him from rendering a just verdict." There are many features distinguishing the case of *Stumm v. Hummel* from the case at bar. (1) In that case the appellant did not seek to set aside a verdict because of a biased juror, but the higher court merely held that the trial court, in the exercise of the degree of discretion which is allowed it in determining the competency of a challenged juror, may have concluded from his answers that he was biased in favor of the defendant. (2) In the case at bar, there is not shown a business partnership, or any connection which would affect the juror in a financial way. (3) It was shown in that case that the juror had talked about the case with the defendant before

the trial, and nothing of that kind appears in this case. (4) There are affidavits in this case to show that appellee and the juror Painter are not close friends, and have no other connection except acquaintanceship, their ownership of shares in the neighborhood threshing machine, and their living within two miles of each other.

There is not presented the question of the competency of one who is a partner with one of the parties in a business which is the principal means of obtaining a livelihood for one or both partners, or in which a commercial business is carried on to any extent; in such a case we feel that a partner would clearly be incompetent to sit as a juror in a case where the other partner was a party. The court did not err in overruling the motion for new trial. Judgment affirmed.

NOTE.—Reported in 108 N. E. 594. As to bias, prejudice or interest such as disqualifies a juror, see 9 Am. St. 744. See, also, under (2) 24 Cyc. 340, 341; (3) 3 Cyc. 331.

PUBLIC SAVINGS INSURANCE COMPANY OF AMERICA
v. COOMBES, ADMINISTRATOR.

[No. 8,547. Filed March 26, 1915. Rehearing denied June 24, 1915.
Transfer denied October 8, 1915.]

1. **INSURANCE.—Construction of Policy.—Forfeiture Clauses.**—While insurance policies are rigidly construed against the insurer and liberally construed in favor of the insured in order to prevent a forfeiture, express provisions that a policy shall be void if the premiums are not paid in accordance with its terms are enforceable in the absence of statutory provisions to the contrary. p. 526.
2. **INSURANCE.—Action on Policy.—Evidence.—Sufficiency.**—Where a policy provided that the premiums were payable in advance on or before each Monday, evidence showing that at times insured paid more than one premium in advance, that she died on July 3, 1911, and that a payment was made on May 22, 1911, though confusing and conflicting on the question of the amount paid on that date, was sufficient to sustain the verdict against the insurer under a provision of the policy that the insurance would be paid

Public Savings Ins. Co. v. Coombes—59 Ind. App. 523.

should the insured die while the premium was in arrears for a period not exceeding four weeks. pp. 527, 528.

3. *INSURANCE.—Payment of Premiums.—Time for Payment.*—Under a policy of insurance providing that the premiums were payable on or before each Monday, payment of the weekly premium at any time during Monday was sufficient. p. 528.

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by Calvin Coombes, administrator of the estate of Ellen Coombes, deceased, against the Public Savings Insurance Company of America. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Bernard Korbly, *Willard New* and *A. W. Knight*, for appellant.

Bernard C. Craig, for appellee.

MORAN, J.—Appellee, Calvin Coombes, administrator of the estate of Ellen Coombes, his deceased wife, brought an action in the Clay Circuit Court against the appellant, Public Savings Insurance Company of America, upon an industrial life insurance policy, issued upon the life of Ellen Coombes. An answer of general denial was filed to the complaint, with an agreement of the parties that all defenses might be offered under the same; trial by the court, judgment in favor of appellee, from which appellant appeals, and assigns as error the overruling of the motion for a new trial. The complaint is in two paragraphs; both are predicated upon the same policy of insurance, and do not differ materially in phraseology. Briefly, it is alleged that appellant is a corporation, and was, on April 24, 1907, doing a life insurance business at Brazil, Indiana, and on that date, insured the life of one Ellen Coombes, for the sum of \$216, for the term of her natural life, in consideration of a weekly premium of ten cents. The premiums were paid, as provided by the terms of the policy, and upon the death of Ellen Coombes, proofs of death were made together with a demand for the insurance due under the policy.

Causes assigned for a new trial are, (1) the decision of

the court is contrary to law; (2) the decision of the court is not sustained by sufficient evidence. The controversy is waged around the proposition as to whether the policy of insurance had lapsed for the nonpayment of the premium before the death of the insured.

The policy of insurance was issued April 24, 1911, and provides among other things as follows:

"This insurance is granted in consideration of the weekly premium hereinbefore stated, which shall be paid to the company or to its authorized representative on or before every Monday during the continuance of this contract, until the 75th birthday of the insured. * * * This policy shall be void * * * if said weekly premiums shall not be paid according to the terms thereof. If for any cause this policy be or become void, all premiums paid thereon shall be forfeited to the company, except as provided herein. All premiums are payable at the home office of the company, but may be paid to an authorized representative of the company; but payments to be recognized by the company must be entered at the time of payment in the premium receipt book belonging with this policy. If for any reason the premium be not called for when due, by an authorized representative of the company, it shall be the duty of the policy holder, before said premium shall be in arrears four weeks to bring or send said premium to the home office of the company or to one of its district offices. Should the insured die while the premium on this policy is in arrears for a period not exceeding four weeks, the company will pay the benefits provided herein, subject to the conditions of the policy. If this policy be lapsed for nonpayment of premium, it will be revived within one year from the date to which premiums have been duly paid, upon payment of all arrears, providing evidence of the insurability of the insured satisfactory to the company is furnished."

There is no contention but that the policy of insurance under consideration was duly issued and that certain premiums were paid during the lifetime of the insured. Appellant seeks to be relieved from the contract on the ground that the weekly premium was not paid according to the terms

of the policy, and that the death of Ellen Coombes did not occur within four weeks after the premiums became due. The policy provides that weekly premiums shall be paid on or before every Monday during the continuance of the contract, and should the insured die while the premium on the policy is in arrears for a period not exceeding four weeks, the company will pay the benefits subject to the con-

1. ditions of the policy. In proceeding to examine the provisions of the policy under consideration, in the light of the facts as they appear in the record, it must be kept in mind that under the law, insurance policies are rigidly construed as against the insurer and liberally construed in favor of the insured, in order to prevent a forfeiture of the policy. *Federal Life Ins. Co. v. Kerr* (1910), 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; *Continental Ins. Co. v. Vanlue* (1891), 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843; *German-American Ins. Co. v. Yeagley* (1904), 163 Ind. 651, 71 N. E. 897; *Rogers v. Phenix Ins. Co.* (1890), 121 Ind. 570, 23 N. E. 498; *Union Life Ins. Co. v. Jameson* (1903), 31 Ind. App. 28, 67 N. E. 199; *Supreme Tent, etc. v. Ethridge* (1909), 43 Ind. App. 475, 87 N. E. 1049. And on the other hand, it must be borne in mind that express provisions in a policy of insurance that if the premium is not paid in accordance with the terms of the policy, the same shall be void, are provisions that are enforceable, in the absence of statutory provision to the contrary. *Klein v. New York Life Ins. Co.* (1881), 104 U. S. 89, 26 L. Ed. 662; *Fowler v. Metropolitan Life Ins. Co.* (1889), 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805; *Grand Lodge, etc. v. Marshall* (1903), 31 Ind. App. 534, 68 N. E. 605, 99 Am. St. 273; *Willcuts v. Northwestern, etc., Ins. Co.* (1882), 81 Ind. 300; *Phenix Ins. Co. v. Tomlinson* (1890), 125 Ind. 84, 25 N. E. 126, 21 Am. St. 203, 9 L. R. A. 317; *Forbes v. Union Ins. Co.* (1898), 151 Ind. 89, 51 N. E. 84; *Tibbits v. Mutual, etc., Ins. Co.* (1903), 159 Ind. 671, 65 N. E. 1033; *Union Cent. Ins. Co. v. Pauly* (1893), 8 Ind. App. 85, 35 N. E. 190; *Wells v. Vermont Ins.*

Co. (1902), 28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578.

At the time the policy was delivered to the insured, a receipt book was turned over to her for the purpose of having appellant's agent, who collected the premiums from

2. time to time, enter the amount of the collection and the date of the receipt thereof on this book. On June 26, 1911, the insured was in poor health, and her husband called at appellant's office in the city of Brazil, Indiana, and paid to the agent of appellant the sum of fifty cents to be applied upon the policy of insurance held by his wife. Within a very short time after the receipt of the money, the agent receiving the same learned from another employe connected with the office that the policy of insurance on Ellen Coombes had been cancelled, and he immediately returned the money to the husband, who received the same. He also notified the husband of the insured that the policy of insurance had been cancelled for the nonpayment of premiums, and requested that the receipt book in possession of the insured be turned over to him, which was done.

It is contended on the part of the appellee that the fifty cents paid by the husband should have been applied to the credit of the insured, and by so applying it, she would have been in good standing at the time of her death, July 3, 1911, and that it was not so credited was no fault of the insured; that the appellant was bound to accept the same. The record discloses that within an hour after the agent of the company had received the premium, he returned it to the husband, who was then acting as the agent of his wife, and that the husband received it back without any protest whatever and that he likewise surrendered up the receipt book of the insured, on which the payments were credited. We are not impressed with this transaction as in any way changing the legal aspect of the parties. We need not, nor do we decide whether this transaction had any legal significance. The original receipt book of the insured and the one kept by the appellant are a part of the record in this cause, and

there is a discrepancy as to the entries of the premiums in the same. There is no dispute but that on May 22, 1911, there was a payment made, but there is sharp conflict as to the amount that was paid. Premiums were supposed to have been paid a week in advance, but this rule had not been strictly followed theretofore. On other occasions prior to this date the insured had paid as much as two weeks at a time, and when so received the money was credited

3. in advance. It is the contention of appellant that the week began at midnight on Sunday and ended at midnight of the following Sunday. If this contention is correct, although there may have been two weeks' payment in advance on May 22, 1911, still the policy would have lapsed at midnight July 2, 1911. An examination of the policy does not support appellant's contention, for it states that the premium was to be paid on or before each Monday, hence any time during Monday if a payment were made, it would be in compliance with the policy. *Mattison v. Marks* (1875), 31 Mich. 421, 18 Am. Rep. 197; *Schenck v. Ballou* (1912), 253 Ill. 415, 97 N. E. 704, Ann. Cas. 1913 A 251; *Wall v. Simpson* (1831), 6 J. J. Marsh. (Ky.) 155, 22 Am. Dec. 72. This leaves but the question of fact

2. as to the amount of the premium paid on May 22, 1911. If two premiums were paid on this date, it would have carried the credit forward to June 5, 1911, and the four weeks of grace would have expired July 3, 1911, the date the insured died, as the policy provided that if death occurred while the premium was not in arrears over four weeks that the company would pay the benefits. The record is far from being clear and satisfactory; there is much confusion so far as the oral testimony is concerned as to the amount of payment on May 22, 1911. The trial court after hearing the evidence and having had opportunity of observing the conduct of witnesses upon the stand, found for the appellee. Under the rules of appellate procedure we are not at liberty to disturb the finding,

as it involves the question of the weight of evidence. Finding no reversible error in the record, judgment is affirmed.

NOTE.—Reported in 108 N. E. 244. As to the conflict of laws respecting nonforfeiture of life policy, see 104 Am. St. 483. As to first and last days in computing time in case of nonpayment of insurance premium, see 49 L. R. A. 208. See, also, under (1) 25 Cyc. 740, 824; (2) 25 Cyc. 943; (3) 25 Cyc. 829; 38 Cyc. 315.

GLENDENNING ET AL. v. COWAN, TRUSTEE.

[No. 9,254. Filed October 13, 1915.]

1. *APPEAL—Assignment of Errors.—Questions Presented.—Scope of Review.*—In a suit for injunction, where a demurrer was sustained to the complaint, the temporary restraining order dissolved, and judgment rendered for defendant on plaintiff's refusal to plead further, no question is presented by an assignment of error on appeal that "the court erred in rendering judgment against the appellants in favor of appellee", and since, on plaintiff's refusal to plead further, the dissolution of the restraining order and judgment for appellee followed as a matter of course, questions attempted to be raised by the quoted assignment, as well as by alleged error in dissolving the restraining order, are determined by a disposition of the assignment of error in sustaining the demurrer. p. 532.
2. *SCHOOLS AND SCHOOL DISTRICTS.—Erection of High School.—Statutes.—Complaint to Enjoin Trustee.*—Under §§6584b, 6584c Burns 1914, Acts 1913 p. 331, relating to the erection of township high schools where for two years last past there were eight or more graduates of the elementary grades, the trustee may establish a high school if the township has no township, city or town high school, and the tax valuation is \$600,000 or more; and he must establish such school under such conditions if petitioned to do so by a majority of the patrons, or, in the absence of such petition, if there is also no high school within three miles of any boundary of the township; hence, a complaint to enjoin the trustee of a township from constructing a high school building under such statute was insufficient in the absence of any averment to show that there was already an established high school in the township. p. 532.
3. *PLEADING.—Complaint.—Theory.—Sufficiency.*—A complaint must be good on the theory on which it proceeds, or it will not be good at all, even though it states facts sufficient to be good on some other theory. p. 535.

Glendenning v. Cowan—59 Ind. App. 529.

4. SCHOOLS AND SCHOOL DISTRICTS.—*School Buildings.—Duty of Township Trustee.—Remedy of Patrons.*—A suit to enjoin the erection of a school building on an existing site will not lie against the township trustee, since, under §6410 Burns 1914, Acts 1901 p. 514, it is the duty of such officer to provide necessary school buildings, and the only remedy of one opposed to the erection of a building under such circumstances is by appeal to the county superintendent. p. 535.
5. SCHOOLS AND SCHOOL DISTRICTS.—*Erection of High School Building.—Complaint to Enjoin Trustee.—Averments as to Indebtedness.*—In a suit to enjoin a township trustee from erecting a township high school building under §§6584b, 6584c Burns 1914, Acts 1913 p. 331, the averment of the complaint, "that if said defendant is permitted to construct said school building the cost thereof will far exceed the indebtedness allowed by law," was merely a conclusion of the pleader, and not equivalent to an averment of facts showing that the township by building such building would incur an indebtedness in excess of that permitted by the Constitution. p. 536.

From Adams Circuit Court; *David E. Smith*, Judge.

Action by William W. Glendenning and others against John W. Cowan, Trustee of Hartford School Township, in Adams County. From a judgment for defendant, the plaintiffs appeal. *Affirmed.*

Peterson & Moran, for appellants.

Clark J. Lutz, for appellee.

HOTTEL, J.—The appellants filed in the Adams Circuit Court a complaint in one paragraph in which they sought to enjoin appellee from letting a contract for the construction of a school building and abandoning school district No. 3 in Hartford Township, said county, and from paying out any money of the township for plans and specifications for the building. On the filing of the complaint a temporary restraining order was issued.

To the complaint appellee filed a demurrer based on all the grounds therefor enumerated by §344 Burns 1914, Acts 1911 p. 415, except ground number three. The ground of the demurrer which challenged the complaint as not containing facts sufficient was accompanied by a memorandum

containing the following objections thereto: (1) Each and every act complained of is an act of discretion from which the law provides a plain and adequate legal remedy by appeal by plaintiffs to the county superintendent. (2) Said complaint does not aver that an appeal has been taken or prayed for from the action of the defendant as such school trustee to the county superintendent. (3) Said complaint is insufficient because it does not aver what the indebtedness of Hartford School Township is, or what the assessed valuation of taxable property is or what amounts of funds are now on hand available for the payments of the cost of construction of the school building mentioned in the complaint. (4) Said complaint does not state facts as to what amount of indebtedness might be incurred by the defendant as such school trustee without exceeding the constitutional limit. (5) That each and every allegation of the complaint is a statement of a conclusion and not the statement of a fact. (6) Said complaint is not properly verified, there being no statement that the person making the affidavit is a party plaintiff or that he has authority to make such affidavit. (7) The complaint does not aver that plaintiffs can not obtain full and adequate relief by an action at law or by appeal. (8) That said complaint does not aver that the plaintiffs or either of them will suffer great or irreparable injury or any fact from which such fact might or could be presumed. (9) Said complaint does not aver or state which if any of the plaintiffs will be especially injured by the acts complained of. (10) Said complaint does not aver that the plaintiffs or either of them will be especially injured by the acts of the defendant complained of but on the contrary said complaint proceeds upon the theory of enjoining the invasion of a public right without any special injury to the plaintiffs or either of them.

This demurrer was sustained. Appellants refused to plead further and judgment was rendered against them for costs, and the temporary restraining order before issued

by the court was dissolved. To such ruling and judgment appellants excepted and prayed an appeal and assign in this court errors on which they rely for reversal as follows: (1) The court erred in sustaining the demurrer of the appellee to the complaint of the appellants. (2) The court erred in rendering judgment against the appellants in favor of appellee. (3) The court erred in dissolving the restraining order issued against the appellee. Under repeated decisions of this and the Supreme Court, the second assigned error presents no question. *Finch v. Travelers Ins. Co.* (1882), 87 Ind. 302, 304; *Indiana Bond Co. v. Shearer* (1900), 24 Ind. App. 622, 57 N. E. 276; *Board, etc. v. State, ex rel.* (1913), 179 Ind. 644, 102 N. E. 97.

If the demurrer to the complaint was properly sustained, upon appellee's refusing to plead further, the dissolution of the restraining order before issued, and judgment in appellee's favor would necessarily follow, so that in any event a disposition of the first assigned error disposes of the last two.

In our disposition of such error we deem it unnecessary to set out the complaint or discuss the various grounds of demurrer thereto. It is sufficient, we think, to say

2. that the averments of the complaint disclose and appellants in their brief state in effect that their action is under Acts 1913 p. 331, §§6584a, 6584b, 6584c Burns 1914, and that their complaint proceeds on the theory that appellee, in attempting to let the contract for the school building mentioned in such complaint, was acting in violation of such act. In support of this contention it is insisted by appellants that the complaint alleges that the appellee trustee is about to let the contract for the erection of said school building without being petitioned so to do, as required by §1 of said act; that two-thirds of the parents, guardians, heads of families and persons having charge of children who were enumerated for school purposes in such town-

ship at the last preceding enumeration had filed a remonstrance with such trustee against the construction of said school building; that there are now, and have been for a number of years last past, two high schools, one at the town of Berne and one at the town of Geneva, Indiana, both of which high schools are within three miles of the boundary line of said township of Hartford.

It is argued that these averments show that such trustee in attempting to let said contract was violating the act in question because it is only in cases where there is no high school within three miles of the boundary line of the township that a trustee thereof, under said act, may, without petition, establish and maintain such high school. The act of 1913 (Acts 1913 p. 331, *supra*) provides as follows: "That in each township of this State having an assessed valuation of more than six hundred thousand dollars * * * of taxable property and wherein there is not now established a high school, and wherein there is not situate a city or town maintaining a high school, and wherein for each of the two years last past there have been eight or more graduates of the township elementary schools, residing in such township, the township trustee may establish and maintain therein, a high school or a joint high school and elementary school, and employ competent teachers therefor; whenever a majority of parents, guardians, heads of families, or persons, having charge of children, who were enumerated for school purposes in said township, at the last preceding enumeration, petition the trustee of said township to establish and maintain a high school or joint high school and elementary school, said trustee shall establish and maintain such a school petitioned for. Sec. 2. That in each township in this state having an assessed valuation of more than six hundred thousand dollars * * * of taxable property and wherein there is not now established a high school in such township or in any town within such township and where there is no high school

within three miles of any boundary line of such township, and wherein for each of the two years last past there have been eight or more graduates of the township elementary schools, residing in such township, the township trustee shall establish and maintain therein a high school and employ competent teachers therefor. Sec. 3. The location of such school shall be determined by the township trustee; *Provided*, That upon the petition of ten parents, guardians, heads of families, or persons, having charge of children who are graduates of the elementary schools and who were enumerated for school purposes at the last preceding enumeration, for another location other than the one determined upon by said township trustee, the matter shall be appealed to the county superintendent of schools, who shall determine upon the location of said building and his decision shall be final, and said township trustee shall proceed in the execution of the provisions of this act."

It seems that under this act there are three conditions under which a high school is authorized, two under the first section and one under the second section, viz., (1) under the first section where a township has a valuation of over \$600,000 *with no established high school therein* and no city or town therein maintaining a high school, and if for two years last past there were eight or more graduates of the elementary grades in said township in such case the trustee *may* establish a high school in such township; or (2) where all said enumerated conditions exist and a majority of the parents, etc., petition the trustee of such township to establish such a high school such trustee *must* establish such school; (3) under the second section of the act, if the first two above enumerated conditions exist, and if there be no high school within three miles of any boundary of said township, and if there were eight graduates in elementary schools then the township trustee *must* establish such high school.

It will be observed that, under such act, the establishment

of such a school, in each instance, is conditioned on there being *no established high school in the township*. In other words, the act in question has no application to a township in which there is already an established high school. There is no averment in appellants' complaint that the township in question did not have such a school. Indeed, it is claimed by appellee, and so far as appears from the complaint the claim may be true, that a high school was already established and being maintained in Hartford Township and that appellee was only proceeding to build a school-house on the present site and location of such high school. In such case the act, *supra*, would have no application. It appears therefore that if appellants' said theory of the complaint be adopted, it was fatally defective because of the absence of said averment.

A pleading must be good on the theory on which it proceeds or it will not be good at all, even though it states facts sufficient to be good on some other theory. *Carmel*

3. *Nat. Gas, etc., Co. v. Small* (1898), 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; *Copeland v. Summers* (1894), 138 Ind. 219, 226, 35 N. E. 514, 37 N. E. 971; *Platter v. City of Seymour* (1882), 86 Ind. 323. We might add that we do not think the complaint in this case sufficient

4. under any theory. It is one of the duties of a township trustee, made so by legislative enactment, to provide necessary school buildings, and if the building in question was to have been erected on an existing site appellants' remedy would have been by a petition to trustee and an appeal to the county superintendent. §6410 Burns 1914, Acts 1901 p. 514; *State, ex rel. v. Black* (1906), 166 Ind. 138, 76 N. E. 882, and cases cited; *State, ex rel. v. Howard* (1910), 174 Ind. 358, 92 N. E. 115; *Advisory Board v. State, ex rel.* (1905), 164 Ind. 295, 299-301, 73 N. E. 700; *Brandt v. State, ex rel.* (1908), 171 Ind. 288, 294, 86 N. E. 337.

The averments on the subject of abandonment of the school in district No. 3 are clearly insufficient under the

Glendenning v. Cowan—59 Ind. App. 523.

holding in the case of *Ireland v. State, ex rel.* (1905), 5. 165 Ind. 377, 379, 380, 75 N. E. 872. The complaint contains the further averment, "That if said defendant is permitted to construct said school building the cost thereof will far exceed the indebtedness allowed by law to be created against the school township aforesaid." Such averment is merely the conclusion of the pleader, and even if proper under the act of 1913 (Acts 1913 p. 850, §343a Burns 1914), is not the equivalent of an averment that such school township by building such school building would be required to incur an indebtedness in excess of that permitted by the Constitution. *Foland v. Town of Frankton* (1895), 142 Ind. 546, 549, 41 N. E. 1031. There is no averment as to the assessed value of the taxable property in said township, the amount of the indebtedness of such township or the amount of funds on hand available for the payment of the construction of said building, and no facts are stated, or averments made even by way of conclusion, from which the court could know or say as a matter of law that the indebtedness attempted to be incurred by the township in the letting of the contract for such building would exceed that permitted by law.

The complaint was insufficient and the demurrer thereto was properly sustained. Judgment affirmed. Moran, J., not participating.

NOTE.—Reported in 109 N. E. 844. See, also, under (1) 3 C. J. 1385; 2 Cyc. 997; (2) 35 Cyc. 927; (3) 31 Cyc. 116; (4) 35 Cyc. 935; (5) 22 Cyc. 925.

Hutchinson v. Wood—59 Ind. App. 537.

HUTCHINSON v. WOOD ET AL.

[No. 9,107. Filed October 13, 1915.]

1. **JUDGMENT.—*Quietting Tax Titles.—Conclusiveness.—Persons Not Parties.***—Under §10393 Burns 1914, Acts 1901 p. 336, providing that all persons who have or claim to have an interest in or lien upon property sold for taxes shall be made parties to an action by the holder to quiet title thereto, persons not made parties are not bound by any judgment that may be rendered in such proceeding. p. 540.
2. **JUDGMENT.—*Quietting Tax Titles.—Conclusiveness.—Parties.***—Plaintiff holding a tax title to land which had been quieted in her grantor, could not enjoin the collection, by the divorced wife of the original owner, of a judgment awarded such divorcee for the support of the children prior to the quieting of such title in plaintiff's grantor, where it appeared that such divorcee had been made a party to the quiet title proceeding in her individual capacity only, since by the divorce decree she was made a trustee for her children, and a judgment against her individually could not disturb the interests of the children. p. 540.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Sarah Hutchinson against Maud Wood and others. From the judgment rendered, the plaintiff appeals. *Affirmed.*

George A. Kurtz and Drummond & Drummond, for appellant.

William N. Bergan and Henry A. Steis, for appellees.

SHEA, C. J.—The trial court in this case made a special finding of facts, the substance of which is as follows: That on February 12, 1906, one John W. Reynolds was the owner of certain described real estate in St. Joseph County, Indiana, and on that date the treasurer of said county sold the undivided one-eighth of said lands to one Isaac Farneman for nonpayment of taxes. Said taxes were not paid, nor was the land redeemed from the sale, and on February 13, 1908, the county auditor executed a tax-title deed to Farneman for the undivided one-eighth of said lands, which was duly recorded February 19, 1908. On June 17, 1908,

one Maud Reynolds (appellee herein, now Maud Wood), wife of John W. Reynolds, filed her complaint for divorce in the St. Joseph Superior Court, praying for the custody of their two children Gertrude E. and Edith M. aged thirteen and nine years, respectively, judgment for \$1,000 alimony, an allowance of \$400 per year for the support of the children and all other proper relief; that summons issued to John W. Reynolds and was personally served by the sheriff on him June 19, 1908. Thereafter the cause was transferred to the St. Joseph Circuit Court, and on July 16, 1908, the court found in favor of plaintiff granting her the divorce and custody of the children until further order of the court; and the "court further finds for the plaintiff in the sum of \$400 against the defendant as alimony, to be used for the support of the children, execution shall not issue on the judgment for two years from this date. Wherefore, it is considered, adjudged, and decreed by the court that the bonds of matrimony existing between the plaintiff, Maud Reynolds, and the defendant, John W. Reynolds, be dissolved, and the plaintiff be granted a divorce. It is further considered and adjudged by the court that the plaintiff have the sole care, custody and education of the minor children mentioned in the complaint, viz.: Gertrude Esther and Edith May Reynolds, until the further order of court, and the defendant is permitted to see said children at all reasonable times. It is further considered and adjudged by the court that the plaintiff recover of the defendant the sum of four hundred dollars, which sum is to be used for the support of said children, and execution shall not issue on said judgment for a period of two years, from this date, together with costs", etc. Defendant Reynolds did not appear at the trial and was defaulted. On February 11, 1907, the treasurer of St. Joseph County, Indiana, sold said real estate as the property of John W. Reynolds for nonpayment of taxes to Isaac Farneman. The taxes were not paid, nor was said real estate redeemed from the sale, and on Febru-

ary 12, 1909, the county auditor executed a tax-title deed to the real estate described in the complaint to said Farneman. On May 31, 1909, Farneman filed in the St. Joseph Circuit Court his complaint to quiet title, a copy of which is set out in the special finding of facts, making defendants thereto John W. Reynolds and Maud Reynolds (now Maud Wood) and the St. Joseph County Savings Bank. Summons was issued May 31, 1909, and served on defendants June 1, 1909. Thereafter such proceedings were had that on June 11, 1909, judgment was rendered in favor of Isaac Farneman quieting his title to said land. The court found in favor of defendant bank on its mortgage lien of \$350. Defendants John W. Reynolds and Maud Wood did not appear to the action and were defaulted. On June 19, 1909, Isaac Farneman and his wife Laura Grace Farneman executed a quitclaim deed to the real estate in controversy to appellant Sarah Hutchinson. It is found that the treasurer of St. Joseph County made the sale of the real estate and executed a tax-title deed without at any time making search for personal property of John W. Reynolds upon which to levy for nonpayment of taxes; that after the granting of the judgment of divorce, appellee Maud Reynolds intermarried with one Wood and is the same Maud Wood now a defendant in the case at bar; that on November 17, 1911, through her attorney, she executed a precept for an execution upon the judgment in the divorce proceedings, and the clerk of the St. Joseph Circuit Court on November 23, 1911, issued said execution; that defendant Millard F. Kerr, then the sheriff of St. Joseph County, levied said execution upon the real estate described in the complaint, and advertised same for sale, and on December 28, 1911, appellant Sarah Hutchinson brought these proceedings against appellee Wood and said Kerr to enjoin the sale of the real estate under said execution or by virtue of the judgment rendered in the cause of *Maud Reynolds v. John W. Reynolds*.

The court upon these facts stated its conclusions of law

to be that the judgment, the collection of which is sought to be enjoined in this action is a lien upon the real estate described in the complaint; that the beneficial interest in the judgment, the collection of which is sought to be enjoined in this action, is in the children of appellee Wood, who are named in the judgment and are not bound by the judgment in the action to quiet title instituted by Isaac Farneman; that appellant Hutchinson is not entitled to recover in this action. Judgment was rendered accordingly.

It is assigned that the court erred in overruling appellant's demurrer to appellee Wood's second and third amended paragraphs of answer, and in the con-

1. clusions of law stated on the special findings of fact.

The statute under which this proceeding was commenced provides that all parties who have liens and "all parties who have or claim to have, or appear of record in any one of the public offices of the county where such land or lot is situated to have any interest in or lien upon such land or lots shall be made defendants in such suit." §10393 Burns 1914, Acts 1901 p. 336. Persons who are not made parties to proceedings to enforce tax liens, are therefore not bound by any judgment that may be entered in such proceeding. *Farrar v. Clark* (1884), 97 Ind. 447; *Abbott v. Union Mut. Life Ins. Co.* (1890), 127 Ind. 70, 26 N. E. 153; *Grigsby v. Akin* (1891), 128 Ind. 591, 28 N. E. 180.

It therefore follows that if the decree entered in

2. the divorce proceeding of Maud Wood made her a trustee for her children, the judgment would not be binding as to her in any other capacity than in which she is sued. *Lord v. Wilcox* (1885), 99 Ind. 491, 496; *Elliott v. Frakes* (1880), 71 Ind. 412, 416; *Unfried v. Heberer* (1878), 63 Ind. 67, 72; *McBurnie v. Seaton* (1887), 111 Ind. 56, 58, 11 N. E. 101; *Sonnenberg v. Steinbach* (1897), 9 S. Dak. 518, 62 Am. St. 885. It is held in the case of *Stonehill v. Stonehill* (1896), 146 Ind. 445, 447, 45 N. E. 600, that the person to whom money for the support of a

O'Neil v. Hudson—59 Ind. App. 541.

child is ordered paid by the court, receives it as trustee, and can only expend it for the benefit of the child. Maud Wood was properly in court in the above proceeding in her individual capacity alone, therefore the judgment would be binding against her in her individual capacity only, and the interest of the children in the judgment lien was not disturbed by the action of the trial court in quieting title thereto in Isaac Farneman.

Other questions need not be considered as this finding disposes of all the questions properly presented.

Judgment affirmed.

NOTE.—Reported in 109 N. E. 794. Instances of conclusiveness in the case of a judgment, see 14 Am. St. 250; 15 Am. St. 142. See, also, under (1) 23 Cyc. 1280; (2) 23 Cyc. 1243.

O'NEIL, v. HUDSON.

[No. 9,108. Filed October 13, 1915.]

APPEAL.—Judgments Appealable.—Order Setting Aside Default.—

An order setting aside a judgment taken by default is not a final judgment from which an appeal will lie.

From St. Joseph Superior Court; *Archibald G. Graham*, Special Judge.

Proceeding by Millie Hudson to set aside a judgment by default taken by William J. O'Neil. From an order setting aside the judgment, this appeal is prosecuted. *Appeal dismissed.*

William N. Bergan and *Henry A. Steis*, for appellant.

George A. Kurtz, for appellee.

FELT, J.—This proceeding was instituted by appellee on April 26, 1912, to set aside a default and judgment in favor of appellant, taken against her on April 19, 1912, the last day of the February term of court. Appellant has assigned as errors, the overruling of the demurrer to the complaint,

and error in the conclusions of law stated on the special finding of facts.

The court stated as its conclusions of law, "That the default and judgment heretofore taken and rendered by the St. Joseph Superior Court on the 19th of April, 1912, in the case of *William O'Neil v. Millie Hudson et al.* be set aside as to the plaintiff herein," and thereupon rendered judgment as follows: "It is therefore considered and adjudged by the court that the default heretofore entered herein be and it is hereby set aside as to the plaintiff. And defendant now prays an appeal to the Supreme Court of Indiana, which is granted", etc. Appellee contends that the foregoing order is not a final judgment from which an appeal lies; that an appeal does not lie from an order vacating or setting aside a judgment, and permitting the aggrieved party to appear and defend the action. The contention of appellee must be sustained. The question is settled by our decisions that such an order is not a final judgment within the meaning of our statutes authorizing appeals. §§671, 1392 Burns 1914, §632 R. S. 1881, Acts 1907 p. 237; *Masten v. Indiana Car, etc., Co.* (1898), 19 Ind. App. 633, 49 N. E. 981; *Foote v. Foote* (1913), 53 Ind. App. 673, 677, 102 N. E. 393; *Smith v. Long* (1909), 43 Ind. App. 668, 88 N. E. 356; *Wehmeier v. Mercantile Banking Co.* (1912), 49 Ind. App. 454, 456, 97 N. E. 558; *Barnes v. Wagener* (1907), 169 Ind. 511, 514, 82 N. E. 1037; *Kelley v. Augsperger* (1908), 171 Ind. 155, 85 N. E. 1004; *Barnhart v. Cissna* (1873), 42 Ind. 477; *State, ex rel. v. Shenk* (1907), 168 Ind. 553, 555, 80 N. E. 541.

The appeal is therefore dismissed.

NOTE.—Reported in 109 N. E. 792. See, also, 3 C. J. 523; 2 Cyc. 601.

SOUERS v. STAHL, TRUSTEE, ET AL.

[No 8,648. Filed October 13, 1915.]

HIGHWAYS.—*Establishment.*—*Descriptions.*—*Sufficiency.*—The description of a highway as being "twenty feet in width off of the east side of lot No. 6 in tract No. 2 in Richardville's Reserve at the forks of the Wabash and Little River, and ten feet in width off of the west side of lot No. 5 in tract No. 2 in Richardville's Reserve at the forks of the Wabash and Little River, said strips of land to be north of the Maple Grove Gravel Road, and twenty feet wide off of the northwest side of lot No. 6 in tract No. 2 in the Richardville's Reserve of ten sections, at the forks of the Wabash and Little River", was sufficient, since technical accuracy is not necessary in such descriptions, and it is enough to enable a surveyor with the assistance of the points definitely named, to trace and designate the road.

From Huntington Circuit Court; *J. T. Merriman*, Judge.

Action by George W. Souers against Ephriam Stahl, trustee of Huntington Township of Huntington County, and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Emmett O. King, for appellant.

C. K. Lucas, Cline & Cline and *C. W. Watkins*, for appellees.

IBACH, P. J.—Suit for a permanent injunction against the execution of a judgment of the Huntington Circuit Court rendered on the verdict of a jury in a proceeding for ascertaining the width of a highway which had been used as such for a period of twenty years, and having the same recorded. The contention of the appellant in this cause is that the description of the land appropriated for the highway is so indefinite and uncertain as to make the judgment wholly void. The description of the road in the verdict and judgment is as follows: "Twenty feet in width off of the east side of lot No. 6 in tract No. 2 in Richardville's Reserve at the forks of the Wabash and Little River, and ten feet in width off of the west side of lot No. 5 in tract No. 2 in

Richardville's Reserve at the forks of the Wabash and Little River, said strips of land to be north of the Maple Grove Gravel Road, and twenty feet wide off of the northwest side of lot No. 6 in tract No. 2 in the Richardville's Reserve of ten sections, at the forks of the Wabash and Little River."

"Technical accuracy is not necessary in the description of a proposed line of road. It is enough that the general description shall be such that a surveyor can, with the assistance of the points definitely named, trace and designate the proposed route." *Adams v. Harrington* (1887), 114 Ind. 66, 14 N. E. 603.

The Maple Grove Gravel Road, and lots 5 and 6 in tract 2 of Richardville's Reserve, and the line between lots 5 and 6, are ascertainable from records and monuments. This being true, it seems that the only reasonable interpretation of the language of the judgment is, that the road was to begin at the intersection of the line between lots 5 and 6 with the Maple Grove Gravel Road, on the north side of said road, and was to consist of ten feet off the west side of lot 5 immediately adjacent to the line between lots 5 and 6, and twenty feet off the east side of lot 6, immediately adjacent to said line, thus making a road thirty feet in width along the line between lots 5 and 6, and then the road made a turn, and followed the northwest line of lot 6 to the termination of such line, and along that side of lot 6 consisted of twenty feet of land off said northwest side of lot 6, immediately adjacent to the northwest line.

We do not agree with appellant that the starting point of the road is ambiguous and uncertain, nor do we think that the fact that courses and distances are not given, nor the terminus definitely stated, renders the description so uncertain that the highway can not be easily located. See, *Cobb v. Taylor* (1893), 133 Ind. 605, 32 N. E. 822, 33 N. E. 615; *Maguire v. Bissell* (1889), 119 Ind. 345, 21 N. E. 326; *Hornet v. Dumbeck* (1907), 39 Ind. App. 482, 78 N. E. 691.

There is no ground for the granting of the injunction asked, and the court properly sustained the demurrers to the complaint, which action constituted the only errors assigned and argued. Judgment affirmed.

NOTE.—Reported in 109 N. E. 796. Establishment of highways by prescription, see 57 Am. St. 744. See, also, 37 Cyc. 121.

W. McMILLEN & SON v. HALL, ADMINISTRATRIX.

[No. 8,657. Filed June 24, 1915. Rehearing denied October 13, 1915.]

1. MASTER AND SERVANT.—*Duty of Master.—Safety of Place and Appliances.—Assumption of Risk.—Liability for Injuries to Servant.*—Generally it is the duty of the master to furnish a reasonably safe place of work and to use ordinary care in furnishing suitable and proper appliances while the servant assumes the risk ordinarily incident to the employment; and the master is liable for injury arising from an infirmity or defect in the place of work or appliance, of which he had knowledge or could have known and which he failed to remedy, if his negligence in that respect was the proximate cause of the injury; but he is not liable for injury resulting from an assumed risk or from contributory negligence. p. 552.
2. MASTER AND SERVANT.—*Injuries to Servant.—Complaint.—Sufficiency.*—A complaint for the death of a stone mill employe, charging negligence in the use of certain defective appliances and in improperly applying the power of an electric traveler to a truck drawing stone which fell upon decedent, in maintaining a defective track on which the truck was operated, in overloading the truck, and in not properly securing and fastening the stone thereon while being moved, though disclosing that the operation of the traveler and truck, as well as the manner of loading and applying the power, were under the control of defendant's servants, sufficiently stated a cause of action, where sufficient facts were alleged to show that decedent was unfamiliar with the surroundings and methods, that he was free from contributory negligence, and that in the absence of inherent defects in the traveler and track, of which defendant had knowledge, there would have been no necessity for the operation of the truck and appliances in the manner in which same were operated at the time. pp. 553, 555.

3. **MASTER AND SERVANT.—*Liability for Injuries to Servant.—Concurring Negligence of Fellow Servant.***—An employer must answer for his own breach of duty proximately resulting in injury to a servant, although the negligence of other servants contributed to the cause that produced the injurious result. p. 554.
4. **MASTER AND SERVANT.—*Injuries to Servant.—Statutory Liability.—Complaint.—Requisites.***—The allegations of a complaint charging a master with liability for failure to take the precautions required by statute for the protection of a servant, must be such as to bring it within the statute, since, where machinery is not of a dangerous character, or is not located so as to endanger the safety of employes or where guarding or fencing is impracticable, the same need not be guarded or fenced. p. 556.
5. **MASTER AND SERVANT.—*Employers' Liability Acts.—Construction.***—The statute of Illinois providing that power-driven machinery and all dangerous places about mills or workshops near to which an employe is obliged to pass or be employed, where practicable, shall be properly inclosed, fenced or otherwise guarded is substantially the same as the statute of Indiana providing for the safety of laborers in and about shops and factories, and is broad enough to embrace a wide scope in its interpretation. p. 556.
6. **MASTER AND SERVANT.—*Injuries to Servant.—Statutory Provisions.—Guards.—Complaint.—Sufficiency.***—A complaint for the death of a stone mill employe while at work in a mill operated by defendant in the state of Illinois, charging negligence in failing to fence or guard a passageway between a stone wall and a track on which a truck was operated in moving stone, came within the provisions of a statute of that state requiring power-driven machinery and all dangerous places about mills or workshops near to which an employe is obliged to pass or be employed to be properly fenced or guarded when practicable, where it appeared therefrom that the passageway through which decedent was obliged to pass and in which he was injured was but two feet wide, with a stone wall on one side ten feet high, and that the other side, along which the heavily loaded truck frequently passed, could have been fenced without interfering with its usefulness. p. 556.
7. **MASTER AND SERVANT.—*Injuries to Servant.—Failure to Guard Machinery.—Liability.—Complaint.***—While no liability is created by the master's failure to guard machinery or properly fence and protect dangerous places unless the failure to do so is the proximate cause of the injury, a complaint charging negligence in such respect need not disclose that the particular injury complained of could have been anticipated by defendant, but is sufficient if it discloses that it could reasonably have been anticipated that an

injury was likely to occur by reason of the condition of the place or appliances. p. 557.

8. MASTER AND SERVANT.—*Injuries to Servant.—Liability.—Intervening Agency.*—A master is not relieved from liability by the fact that the injury was caused by the concurring acts of himself and the fellow servants of the injured employe; and the negligence of the fellow servants, to constitute an intervening agency that would relieve the master, must have been outside the control of the master and not put in motion by his own wrongful act, and must have been such as to break the line of causation and become itself the proximate cause of the injury. pp. 557, 562.
9. TRIAL.—*Verdict.—Answers to Interrogatories.—Motion for Judgment.*—Where a cause goes to trial on two paragraphs of complaint, a motion for judgment on answers by the jury to interrogatories is properly overruled if the answers are consistent with the verdict on either paragraph. p. 558.
10. MASTER AND SERVANT.—*Injuries to Servant.—Verdict.—Answers to Interrogatories.—Presumptions.*—Where the answers by the jury to interrogatories show that the injuries complained of occurred in the state of Illinois, the court must presume, as to the legal questions presented in determining whether the answers conflict with the verdict on a paragraph of complaint charging common-law negligence, that the common law prevails in that state. p. 559.
11. MASTER AND SERVANT.—*Injuries to Servant.—Answers to Interrogatories.—Review.*—Where appellant's contention that the jury's answers to interrogatories disclose that decedent's injury arose as an incident to the employment has no application to the second paragraph of complaint, and there is nothing to disclose that the verdict rests upon the first paragraph, the court will not determine if the contention is well taken as to the first paragraph, since it could in no event relieve appellant from liability under the second paragraph. p. 559.
12. MASTER AND SERVANT.—*Injuries to Servant.—Violation of Statutory Duty.—Assumption of Risk.*—In actions for injuries to a servant because of the master's failure to discharge a statutory duty the doctrine of assumed risk does not apply. p. 559.
13. TRIAL.—*Verdict.—Scope.*—A general verdict necessarily includes a finding on all material issues involved. p. 559.
14. MASTER AND SERVANT.—*Injuries to Servant.—Verdict.—Answers to Interrogatories.—Contributory Negligence.*—Where the complaint alleged that the duties of plaintiff's decedent were to measure stone, direct the work in the millyard as to what stone was to be sawed, and to keep account of the same, and that he was not in any manner charged with furnishing appliances, tools or machinery, or to keep the working premises in safe condition, an-

swers by the jury to interrogatories which did not disclose that decedent had anything to do with loading stone onto a truck, which fell therefrom and injured him because of defects in the track and appliances by which the truck was moved, though showing that he could have discovered the conditions which brought about his injuries had he looked, did not as a matter of law preclude a recovery or necessarily create a conflict with the general verdict, and the court can not say therefrom as a matter of law that decedent was not excused from looking, or that he was guilty of contributory negligence in not so doing. p. 560.

15. MASTER AND SERVANT.—*Injuries to Servant.—Choice of Ways.—Answers to Interrogatories.*—A special finding that plaintiff's decedent chose the way that he did in going about the performance of his work at the time of his injury, when he could have selected a safer way, is not equivalent to a finding that he voluntarily encountered a known and appreciated danger, and is not in conflict with a general verdict for plaintiff. p. 560.
16. MASTER AND SERVANT.—*Injuries to Servant.—Answers to Interrogatories.—"Immediate Cause".—Proximate Cause.*—Answers by the jury to interrogatories, in an action for the death of a stone mill employe caused by stone falling from a truck, showing that the truck was overloaded; that the stones, which were four feet wide, were placed on the truck edgewise and were not fastened; that the rope was fastened to one end of a beam under the stone; that power was suddenly applied, and that decedent was injured by the stone being thrown upon him by the sudden jerk of the truck, do not overthrow the general verdict as showing that the injury was brought on by the acts of decedent's fellow servants, since they disclose no more than that such conditions were the immediate cause of the injury and an "immediate cause" of injury is not necessarily the proximate cause. p. 561.
17. APPEAL.—*Review.—Verdict.—Answers to Interrogatories.*—Answers to interrogatories do not overcome the general verdict, where such answers, when considered in view of the presumption in favor of the general verdict, present no irreconcilable conflict with the general verdict. p. 562.
18. MASTER AND SERVANT.—*Injuries to Servant.—Instructions.—Applicability to Issues.*—An instruction informing the jury that it was the master's duty to inspect and examine the premises where his servants were required to work, etc., was not objectionable as being outside the issues, where the complaint alleged that decedent was subject to the orders of the superintendent, and that inherent defects in the appliances had existed for some six months prior to the injury. p. 562.
19. APPEAL.—*Review.—Instructions.*—Part of an instruction, even if subject to the objections urged when standing alone, does not

W. McMillen & Son v. Hall—59 Ind. App. 545.

render the instruction fatal, where such objection is not tenable when the instruction is considered as a whole. p. 563.

20. MASTER AND SERVANT.—*Injuries to Servant.—Duty of Master.—Instructions.*—An instruction merely stating that where an appliance is unguarded it should be guarded if practicable to do so, and that it is the duty of the master to see that it is so guarded, was not misleading or objectionable as requiring the master to guard in a particular manner or by a particular method. p. 563.
21. APPEAL.—*Review.—Refusal of Instructions.*—Appellant is not harmed by the refusal of requested instructions, where those given cover the issues and are applicable to the facts. p. 564.
22. EVIDENCE.—*Opinion Evidence.—Admissibility.*—While it is not proper to take the opinion of witnesses on matters where the jury is able to form as reliable an opinion from the facts placed before it, the admission of such evidence will not work a reversal where it appears that the facts were not free from complication, and that appellant was not harmed by its admission. p. 564.

From Owen Circuit Court; *James B. Wilson*, Judge.

Action by Clara R. Hall, administratrix of the estate of Morton M. Hall, deceased, against W. McMillen & Son, a corporation. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Ira C. Batman, Robert G. Miller, James W. Blair and Fowler & Elliott, for appellant.

Frank L. Hume and Rufus H. East, for appellee.

MORAN, J.—On September 5, 1911, Morton M. Hall, a foreman in appellant's stone plant, in the city of Chicago, was severely injured by several large slabs of stone falling from a transfer truck over and upon him, while he was passing alongside a track on which a truck was being moved, transporting stone in appellant's yard. Death resulted from the injury within two days thereafter; and for which appellee recovered a judgment against the appellant, for the benefit of his next of kin, in the sum of \$6,000, on the ground that his death was caused by the negligent conduct of appellant. From this judgment appellant has appealed.

Errors relied upon for reversal are, (1) overruling appel-

lant's demurrer to each paragraph of the complaint; (2) neither paragraph of complaint states facts sufficient to constitute a cause of action; (3) overruling appellant's motion for judgment on answers to interrogatories notwithstanding the general verdict; (4) overruling appellant's motion for a new trial.

The complaint is in two paragraphs, the first paragraph embraces a charge of common-law negligence; the second is based upon a statute of the state of Illinois, requiring machinery and appliances to be guarded, and is similar to the usual factory act enacted by a number of the states in recent years for the protection of workingmen. In substance, the first paragraph of complaint alleges that appellant is the owner and operator of a stone sawmill in the city of Chicago, Illinois, and in the counties of Lawrence and Monroe, this State, and that decedent was employed in the Chicago plant as a foreman with limited authority, subject to orders of appellant's superintendent, and had been thus engaged for five weeks prior to the injury. In the plant was a tramway, on which a traveler was operated by electric power, which could run east and west on the tramway, or north and south on its carriage. A transfer track extended near the tramway, on which a stone truck was operated; a metal rope connected the traveler with the truck on which the stones were placed while being moved from the mill to the yard; within five feet of the transfer track on the east were a large number of mill blocks, which formed a stone wall ten feet high, and between the stone wall and the track was a passageway used by appellant's employes in going from one side of the mill-yard to the other. On September 5, 1911, while appellee's decedent was passing through the passageway, several large slabs of stone loaded on the truck, weighing several thousand pounds, fell from the truck upon him, suddenly and without warning. That the injury was caused by the carelessness and negligence of appellant in adopting an improper method

in moving the truck loaded with stone. The appliances used were unsafe and in order to safely draw out the car when loaded with stone, appellant should have maintained at the end of the track, on which the truck was operated, a grooved wheel, securely fastened for the purpose of running the metal cable through from the traveler and attach the same to the center end of the truck, so as to give a direct pull, but instead, appellant used a cable extending from the overhead electric traveler downward and fastened by looping the cable over the end of the beam that projected over the side of the car, causing an indirect pull forward and upward, rendering the truck liable to tip and jostle the stone resting on this beam, thereby endangering the lives of the laborers working in and about the truck. It is likewise alleged that appellant negligently maintained a defective track upon which the truck was used, in that it was not properly ballasted; that in the middle of the same, which was about twenty-five feet in length, it would sag when a car loaded with stone would pass over it at this point, which required a greater amount of power to move the load. At the time of the injury the truck stopped at this point on account of the sagging of the track and lack of power, and in starting the same the power was quickly applied with full force, causing the truck to be jerked and jostling the stone from the truck, which came in contact with appellee's decedent. It is further charged that appellant was negligent in overloading the truck at the time appellee's decedent was injured and by so overloading, the traveler had not sufficient power to draw the truck when it reached the point in the track where the track sagged and the speed of the truck ceased, the cable was slackened, and the power then quickly applied, thus violently jostling the stone from the car. Further it is alleged that at the time of the injury and for six months prior thereto, appellant was negligent in loading the stone on the car by placing the heavy slabs of stone edgewise on the truck, leaning

the same against blocks of stone on the side of the car without being properly fastened. It is alleged that appellant had full knowledge of the various defects in the appliances and the place, as set forth in the complaint, and that appellee's decedent was without such knowledge. The second paragraph of the complaint pleads practically the same facts as the first and in addition, it sets forth the statute of Illinois, requiring power-driven machinery and dangerous places in and about factories, mills or workshops near to which employes are obliged to pass to be properly inclosed, fenced and otherwise guarded, where practicable, the passageways to be kept well lighted and free from obstructions and to be of ample width. The statute, it is alleged, was violated, and by reason thereof appellee's decedent was injured, which resulted in his death.

It will be observed that the first paragraph of complaint charges four specific acts of negligence, (1) defective appliances and improperly applying the power of the electric traveler to the truck drawing the stone; (2) a defective track, on which the truck was operated; (3) overloading the truck; (4) in not properly securing and fastening the stone on the truck, while being moved. The demurrer presents the question as to whether any of those charges is sufficiently pleaded to fasten liability upon appellant under the law. We must approach an examination of the paragraph of complaint under consideration, keeping in mind the general principles of the law that shed light on what it takes to create liability on the part of the master for an injury to his servant while performing services for the master. It can be said generally that it is the duty of

1. the master to furnish a reasonably safe place for the servant to perform his labor, and he must exercise ordinary care in furnishing suitable and proper appliances with which the labor is to be performed. And the negligence of the master for which the servant can recover must have been the proximate cause of the injury. On the other

hand when the servant enters upon the employment of the master, as a matter of contract, he assumes the risk ordinarily incident to the employment, and for an injury that results to the servant, which is ordinarily incident to the employment, the master is not liable, nor is he liable if the injury was caused by the contributory negligence of the servant. The master must have had knowledge of the infirmity of the place where the services were being performed, if an injury was caused thereby, or if by defective appliances, that the same were defective; but it is sufficient if he could have ascertained these facts by the exercise of ordinary care, and the servant must have been without such knowledge. *Lyons v. City of New Albany* (1913), 54 Ind. App. 416, 103 N. E. 20; *Sullivan v. Indianapolis, etc., Traction Co.* (1914), 55 Ind. App. 407, 103 N. E. 860; 26 Cyc. 1156; *Pittsburgh, etc., R. Co. v. Adams* (1886), 105 Ind. 151, 5 N. E. 187; *Lake Erie, etc., R. Co. v. McHenry* (1894), 10 Ind. App. 525, 37 N. E. 186.

Appellant's counsel urge many objections to the pleading under consideration, the most serious of which is that the injury alleged was caused by the conduct of the

2. fellow servants of appellee's decedent. It is true the pleading discloses that the operation of the electric traveler and the truck upon which the stone was being moved, as well as the manner of loading the stone and applying the power to move the loaded truck, were under the control of appellant's servants. It is also alleged among other things that the electric traveler had insufficient power and capacity to do the work required of it, and that the track was defective, in not being properly ballasted, and would sink into the earth at a given point when the truck was being moved over that part with a heavy load. The allegation as to the lack of capacity of the electric traveler to perform the work required of it, and the defect in the track, are in their nature inherent defects, and these defects, it is alleged, were within the knowledge of appellant and

caused the injury, and that appellee's decedent was unfamiliar with the millyard and premises, and knew nothing of the methods in use in the mill and the premises as to the loading and moving of the stone on the truck. These are allegations of fact, and unless the allegation as to the performance of the service by the fellow servants of appellee's decedent discloses that the injury was caused and grew out of the handling of the appliances by the fellow servants of appellee's decedent, and not by reason of the defective place in which to perform the service, or defective appliances, a cause of action is stated. If the infirmities of the place of performing the service, or the defective

3. appliances as alleged, were the proximate cause of the injury, which resulted in the death of appellee's decedent, then the appellant could not escape liability even though the acts of the fellow servant concurred in producing the result, which caused the injury, as an employer must answer for his own breach of duty to his servant, although one or more of his servants were also guilty of negligence, which contributed to the cause that produced the injurious result. *Rogers v. Leyden* (1891), 127 Ind. 50, 26 N. E. 210; *Cincinnati, etc., R. Co. v. Lang* (1889), 118 Ind. 579, 21 N. E. 317; *Miller v. Louisville, etc., R. Co.* (1891), 128 Ind. 97, 27 N. E. 339, 25 Am. St. 416; *Louisville, etc., R. Co. v. Heck* (1898), 151 Ind. 292, 50 N. E. 989; *Ohio, etc., R. Co. v. Stine* (1894), 140 Ind. 61, 39 N. E. 246; *New York, etc., R. Co. v. Perriguet* (1894), 138 Ind. 414, 34 N. E. 233, 37 N. E. 976; 3 Elliott, Railroads (2d ed.) §1306; *Marietta Glass Mfg. Co. v. Pruitt* (1913), 180 Ind. 434, 102 N. E. 369. "Where the master is negligent he is responsible, although the negligence of a fellow servant may have concurred in bringing injury upon the plaintiff." *Rogers v. Leyden*, *supra*. In *Indiana Car Co. v. Parker* (1885), 100 Ind. 181, the court quoting with approval from 2 Thompson, Negligence 984, says: "'But the master does not discharge his duty in this regard by

providing proper and safe machinery, or fit servants, in the first instance, and then remaining passive. "It is a duty to be affirmatively and positively fulfilled and performed." He must supervise, examine, and test his machines as often as custom and experience require.' * * * Ordinary care requires that a master shall take notice of the liability of the parts of machinery to decay from age, or wear out by use."

Without following appellant's discussion in detail as to the infirmities urged against the first paragraph of complaint, an examination of the same discloses that

2. appellee's decedent did not understand and appreciate the danger he was encountering when he attempted to pass the car that was temporarily stalled on account of the track giving away and the lack of power to move the same. Had the track been in proper condition, on which to have moved the heavily loaded truck, or had the power applied to the truck been sufficient to have moved the same, notwithstanding the poorly constructed track, the truck would not have been stalled at the time it was, and there would have been no necessity for slackening the cable for the purpose of quickly applying the power, and hence the truck would not have been jerked and the heavy slabs of stone, each weighing in the neighborhood of two thousand pounds, thrown over and upon appellee's decedent who chanced to be passing in close proximity at the time. Nor does this paragraph of complaint disclose that he was guilty of contributory negligence in selecting this passageway at the time he did to go from the yard to the mill. The first paragraph of complaint states facts sufficient to constitute a cause of action.

It is maintained that the second paragraph of complaint, which counts upon a violation of a statute, discloses by its averments that it does not come within the statute upon which it is based, that the danger arose from a stone falling from a truck, and to hold this to be within the statute would

be an unwarranted enlargement of the statute by construction. We are mindful that the pleading being based

4. upon the violation of a statute, a special remedy, the allegations must be such as to bring it within the statute in order to be sufficient. Where the machinery is not of a dangerous character, or is not located so as to endanger the safety of laborers, or where guarding or fencing is impracticable, the same need not be guarded or fenced. *United States Cement Co. v. Cooper* (1909), 172 Ind. 599, 88 N. E. 69; *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290, 75 N. E. 270; *Robertson v. Ford* (1905), 164 Ind. 538, 74 N. E. 1.

The statute of Illinois under consideration is entitled, "An act for the health, safety and comfort of employes in factories, mercantile establishments, mills and

5. workshops"; and among other things, the statute itself provides that all power-driven machinery and all dangerous places about mills or workshops near to which an employe is obliged to pass or be employed, where practicable, shall be properly inclosed, fenced or otherwise guarded. The title of the act and statute are substantially the same as the title of the act and the statute of this State, providing for the safety of laborers in and about shops and factories. It was held in *United States Furn. Co. v. Taschner* (1907), 40 Ind. App. 672, 81 N. E. 736, in reference to the scope of our statute, "It is broad enough to embrace a wide scope in its interpretation."

There is an allegation in the pleading under consideration, that the passageway, through which appellee's decedent was required to pass in the performance of his labor and

6. where he was injured, was but two feet wide, with a stone wall on one side, ten feet high, and a truck heavily loaded with stone frequently passing upon a track on the other side. The statute, it will be noticed, provides that all dangerous places where employes are obliged to pass or be employed, where practicable, shall be properly

inclosed, fenced or otherwise guarded, and of ample width and free from obstruction. There is enough in the pleading to show that the passageway could have been fenced without interfering with its usefulness, and the nature of the machinery and character of the place, where appellee's decedent was injured, were such as to come within the purview of the statute.

It is further insisted that the second paragraph of complaint is insufficient for the reason that there was an intervening act of negligence on the part of the fellow

7. servants of appellee's decedent, which appellant was not bound to have anticipated. That the narrow passage and the sagging of the track became dangerous only by the new and independent force set in motion by the decedent's fellow servants in the loading of the car and handling of the same. If appellant's contention is true, it would not be liable under this paragraph of complaint, as the failure to guard machinery or properly fence and protect surroundings that are dangerous to employes creates no liability unless the failure to do so is the proximate cause of the injury. *Brown v. American Steel, etc., Co.* (1909), 43 Ind. App. 560, 88 N. E. 80; *Nickey v. Steuder* (1905), 164 Ind. 189, 73 N. E. 117; *Evansville Hoop, etc., Co. v. Bailey* (1909), 43 Ind. App. 153, 84 N. E. 549. An examination of the pleading discloses that it is not susceptible of the construction contended for by appellant in this behalf. It is not necessary in order to hold appellant liable that the pleading disclose that the particular injury complained of could have been anticipated by appellant. It is sufficient if the pleading discloses, as it does, that it could reasonably have been anticipated that an injury was likely to occur by reason of the condition of the place and appliances. An intervening agency must be one over

8. which the original tortfeasor had no control and was not put in motion by his wrongful act in order to relieve the original wrongdoer. The intervening agency

must break the line of causation and become itself the proximate cause of the injury in order to become a defence to a charge of negligence. Even should it be conceded that the injury was caused by the concurring acts of appellant and the fellow servants of appellee's decedent, this would not relieve appellant from liability. *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 122. The court did not err in overruling the demurrer to the second paragraph of complaint.

The next error presented is the overruling of appellant's motion for judgment on the answers to interrogatories. With the general verdict the jury returned answers to 171 interrogatories. The cause having gone to trial upon

9. two paragraphs of complaint, one based on the common law and one on the violation of a statute, if the answers to the interrogatories are consistent with the right to recover on either paragraph, the motion was properly overruled. *Cleveland, etc., R. Co. v. Berry* (1899), 152 Ind. 607, 52 N. E. 415, 46 L. R. A. 33; *Toledo, etc., R. Co. v. Milligan* (1876), 52 Ind. 505; *Frazer v. Boss* (1879), 66 Ind. 1.

It is contended with much earnestness that the answers to interrogatories are in irreconcilable conflict with the general verdict on either paragraph of the complaint; that as to both paragraphs, because the answers to interrogatories disclose that the injury arose solely from the conduct of the fellow servant of appellee's decedent; and on the first paragraph because appellee's decedent received his alleged injuries from the dangers which he assumed in entering into and continuing in the employment; and on the second paragraph because he voluntarily encountered the danger, which was known to him, or could have been known by the exercise of ordinary care, that he voluntarily selected a dangerous way to go from the yard to the mill, when there was a safe way open and known to him, and further that under this paragraph, the answers disclose that no provi-

sion of the statute, on which the paragraph is based, was violated.

The injury to appellee's decedent occurred, as disclosed by the answers to the interrogatories in the state of Illinois, and therefore as to the legal questions presented, so

10. far as they apply to the first paragraph of complaint, we must assume that the common law prevails in that state. *Southern R. Co. v. Elliott* (1908), 170 Ind. 273, 82 N. E. 1051.

The contention that the answers to the interrogatories disclose that the injury to appellee's decedent arose as an incident to the employment has no application to the

11. second paragraph of complaint. There being nothing to disclose that the verdict rests upon the first paragraph of complaint, it would serve no useful purpose to enter upon an examination of this question to ascertain whether it is well taken as to the first paragraph of complaint, for even if so, it would not relieve appellant from liability under the second paragraph of complaint. It is the law of this State as well as of the state of Illinois,

12. that where an action proceeds upon the theory that the injury, for which a recovery is sought was because of the failure of the master to perform a statutory duty, which he owed his servant, that the doctrine of the assumption of risk has no application. *United States Cement Co. v. Cooper* (1909), 172 Ind. 599, 88 N. E. 69; *Montieth v. Kokomo, etc., Co.* (1902), 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290, 76 N. E. 1060; *Bessler v. Laughlin* (1907), 168 Ind. 38, 79 N. E. 1033; *Sare v. Hoadley Stone Co.* (1914), 57 Ind. App. 464, 105 N. E. 582; *Adams v. Antles* (1915), 57 Ind. App. 594, 105 N. E. 931; *Streeter v. Western Wheeled Scraper Co.* (1912), 254 Ill. 244, 98 N. E. 541, 41 L. R. A. (N. S.) 628, Ann. Cas. 1913 C 204.

The general verdict necessarily finds for appellee on all material issues involved. *Egan v. Louisville, etc., Traction*

- Co.* (1914), 55 Ind. App. 423, 103 N. E. 1100. The
13. complaint alleges that the duties of the deceased were to measure stone, direct the work in the millyard as to what stone was to be sawed, and keep account of
 14. the same, but was not in any manner charged with furnishing appliances, tools or machinery, or to keep the working premises in safe condition. There is nothing in the answers to interrogatories to disclose that the decedent had anything to do with the loading of the stone or the moving of the truck at or before the time of the injury. On the other hand there are answers that he could have known the condition of the track and the method employed in handling and removing the stone, and that he could have ascertained the condition just before attempting to pass the stalled truck, if he had looked, and that there were safe passageways known to him other than the one he selected, and that he selected the passageway wherein he was injured, when he could have selected a safe one. The finding that he could have discovered the conditions which brought about his injury had he looked, does not as a matter of law preclude a recovery, or necessarily bring the answers to the interrogatories in conflict with the general verdict. The record is not such in this connection as to say as a matter of law that he was not excused from looking, or that he was guilty of contributory negligence in not so doing. The surrounding conditions were such, as is disclosed by the answers to the interrogatories, that he was excused from directing his attention specifically upon the source from which he was injured at the time or immediately prior thereto. The element of contributory negligence in this particular does not bring the answers to the interrogatories in irreconcilable conflict with the general verdict. *Lake Erie, etc., R. Co. v. Parrish* (1910), 46 Ind. App. 577, 93 N. E. 550. The finding that he chose the way
 15. that he did in going from the millyard to the mill when he could have selected a safer way is not equiva-

lent to a finding that he voluntarily encountered a known and appreciated danger. The answers do not disclose that by choosing the passageway he did, the danger he thus encountered by doing so was so open, glaring and imminent that the court can say as a matter of law that a person of ordinary prudence would not have encountered it. *Jenney Electric Co. v. Flannery* (1912), 53 Ind. App. 397, 98 N. E. 424; *Pulse v. Spencer* (1915), 57 Ind. App. 566, 105 N. E. 263; *Sare v. Hoadley Stone Co.*, *supra*. ***

It is further insisted that the answers to interrogatories disclose that the injury was brought about by the fellow servants of the decedent in unnecessarily overloading

16. the truck and in placing the narrow slabs of stone on their edge without being fastened, and by attaching the metal rope to one end of the cross-beam under the stone, and then starting the truck after it was stalled, with a sudden jerk. The answers to the interrogatories disclose that the truck was overloaded, that the stones, which were four feet wide, were placed on the truck edgeways and were not fastened; that the metal rope was fastened to one end of the beam under the stone, and that the power was suddenly applied after the truck was stalled, and appellee's decedent was injured by the large slabs of stone being thrown from the truck upon him by the sudden jerk of the truck. The facts found by these answers disclose no more than that the conditions found thereby were the immediate cause of the injury. An immediate cause of an injury is not necessarily the proximate cause. *Cincinnati, etc., R. Co. v. Worthington* (1903), 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478, 96 Am. St. 355; *Baltimore, etc., R. Co. v. Kleespies* (1906), 39 Ind. App. 161, 76 N. E. 1015, 78 N. E. 252.

The conditions that existed immediately preceding the injury if regarded as independent and intervening agencies as contended for by appellant, in order to become the proxi-

W. McMillen & Son v. Hall—59 Ind. App. 545.

mate cause, and thus supplant the original wrongful
8. act of failing to maintain a sufficient track and power to move the truck, as the general verdict finds, must be such as to break the chain of causation and become the direct cause of the injury. And even then if the attending circumstances were such that these conditions might reasonably have been expected to arise so as to produce the injury, appellant could not escape liability. *Cleveland, etc., R. Co. v. Clark, supra; Chicago, etc., R. Co. v. Mitchell* (1914), 56 Ind. App. 354, 105 N. E. 396; *Nickey v. Steuder, supra; Cleveland, etc., R. Co. v. Patterson* (1906), 37 Ind. App. 617, 77 N. E. 445. An intervening agency, which merely concurs with the proximate cause in producing an injury, will not relieve the master from liability. So if the conduct of the fellow servant of appellee's decedent intervened in producing the injury, this, as aforesaid, will not relieve appellant from answering for its own conduct.

When all the answers to the interrogatories are considered, and especially in view of the fact that every presumption must be indulged in favor of the general verdict as

17. against such answers, there is not an irreconcilable conflict between the answers to interrogatories and the general verdict. *Wabash R. Co. v. McDoniels* (1915), 183 Ind. 104, 107 N. E. 291. No error was committed in overruling the motion for judgment on the answers to interrogatories.

It is insisted that the motion for a new trial should have been granted by reason of the error of the court in giving at the request of appellee, instructions Nos. 8, 17 and 23, and in refusing to give instructions Nos. 43, 44, 47, 48, 50, 52, 56 and 65, as requested by appellants, and in admitting certain evidence over the objections of appellant. The

18. objection urged to instruction No. 8 given by the court is that it is outside the issues. This instruction in substance informed the jury that it was the duty

of the master to inspect and examine the premises where he required the servants to perform their labor, and that he could not so delegate this duty as to escape the consequence of the failure of the subordinate to perform the same, and that the negligence of the subordinate would be chargeable to the master. The complaint alleges that the decedent was subject to the orders of the superintendent, and it further alleges that the inherent defects in the appliances existed for some six months prior to the injury. In view of the allegations of the complaint, and the facts in the cause, the instruction was not erroneous. 2 Thompson, Negligence 984; *Romona, etc., Stone Co. v. Shields* (1909), 173 Ind. 68, 88 N. E. 595; *Indiana Car Co. v. Parker, supra*.

It is claimed that instruction No. 17, given by the court, informed the jury that it would be authorized in holding appellant liable for the discharge of the duties owing
19. to it from the fellow servants of the decedent. The first part of the instruction, if standing alone, might be subject to the objections urged. The closing part of the instruction informed the jury in substance that if the injury and death was caused in the manner charged in the first paragraph of complaint, and if the decedent prior to and at the time of his injury had no knowledge or means of knowledge of the capacity and power of the traveler, and was free from fault, and if all other material allegations of the paragraph were established, appellee would be entitled to recover. The objection urged against it is not tenable when the whole instruction is considered.

The objection urged to instruction No. 23 given by the court is that this instruction informs the jury that it is
20. the duty of the master, if he found that certain appliances were unguarded, to guard the same in a particular manner and by a given method. The instruction does not travel as far as appellant contends that it does. It does say that where an appliance is un-

guarded and if practicable to do so, it should be guarded, and that it is the duty of the master to see that it is so guarded. The instruction was not misleading.

Instructions tendered by appellant, and which it complains of the trial court in not giving, went to the fellow servant rule, the assumption of risk, the choice of

21. ways by the servant in performing his labor and the proximate cause. The appellant was not harmed by the refusal of the court to give either of the instructions requested, as the instructions given by the court to the jury covered the issues and each branch of the case, and were applicable to the facts.

The objections urged against the admission of evidence are that it was not proper to take the opinions of certain witnesses as to what was the proper method of attach-

22. ing the traveler to the truck, and as to whether the method used in drawing the truck along the track was proper or improper. Without entering into the objections urged against the various questions propounded in this behalf, the record does not disclose that appellant was harmed by the admission of this class of testimony. It is not proper to take the opinion of witnesses on matters where the jury can be put in possession of all of the facts in the case, and can form as reliable an opinion on the question, as a witness. The case at bar, however, was one, as disclosed by the facts, not entirely free from complication, and those familiar with matters pertaining to the handling of the appliances under consideration were in position to throw some additional light thereon by their opinions, other than that which came from a statement of the facts. *Consolidated Stone Co. v. Williams* (1901), 26 Ind. App. 131, 57 N. E. 558, 84 Am. St. 278; *Romona, etc., Stone Co. v. Shields, supra*; *City of Indianapolis v. Huffer* (1868), 30 Ind. 235; *Jenney Electric Co. v. Branham* (1896), 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; *Bennett v. Needham* (1882), 83 Ind. 566, 43 Am. Rep. 78; *Louisville,*

City of Gary v. Geisel—59 Ind. App. 565.

etc., *R. Co. v. Berkey* (1894), 136 Ind. 181, 186, 35 N. E. 3; *Swygart v. Willard* (1906), 166 Ind. 25, 76 N. E. 755.

No available error being found in the record, judgment is affirmed.

NOTE.—Reported in 109 N. E. 424. As to how far servant may rely on knowledge of master in assuming risk, see 24 Am. St. 320. As to different forms of statement of the general rule with respect to master's duty as to place and appliances furnished to servant, see 6 L. R. A. (N. S.) 602. On servant's assumption of risk of master's breach of statutory duty, see 6 L. R. A. (N. S.) 981; 19 L. R. A. (N. S.) 646; 22 L. R. A. (N. S.) 634; 33 L. R. A. (N. S.) 647; 40 L. R. A. (N. S.) 471; L. R. A. 1915 E 527. As to knowledge as element of employer's liability, see 41 L. R. A. 33. Assumption of risk on failure of employer to perform statutory duty, see 4 Ann. Cas. 599; 13 Ann. Cas. 36; Ann. Cas. 1913 C 210. See, also, under (1) 26 Cyc. 1097, 1136, 1177, 1226; (2) 26 Cyc. 1384; (3) 26 Cyc. 1302; (4) 26 Cyc. 1392; (5) 26 Cyc. 1079, 1134; (7) 26 Cyc. 1389; (8) 26 Cyc. 1305; (9) 38 Cyc. 1927; (10) 16 Cyc. 1084; (11) 26 Cyc. 1513; (12) 26 Cyc. 1180; (13) 38 Cyc. 1869; (14) 38 Cyc. 1927; (15) 26 Cyc. 1515; (17) 38 Cyc. 1928; (18) 26 Cyc. 1494; (19) 38 Cyc. 1778; (20) 26 Cyc. 1491, 1497; (21) 38 Cyc. 1711; (22) 17 Cyc. 60.

CITY OF GARY v. GEISEL.

[No. 8,579. Filed May 12, 1915. Rehearing denied October 13, 1915.]

1. TRIAL.—*Verdict.*—*Answers to Interrogatories.*—A general verdict is not overcome by the jury's answers to interrogatories, nor by isolated facts shown therein, unless such answers or such isolated facts are in irreconcilable conflict with such verdict. p. 569.
2. APPEAL.—*Review.*—*Verdict.*—*Presumptions.*—As against the jury's answers to interrogatories all reasonable presumptions are to be indulged in favor of the general verdict. p. 569.
3. NEGLIGENCE.—*Concurrent Negligence.*—*Liability.*—A person injured by the concurrent negligence of two parties may recover from either or both, and neither can avoid liability on the ground that the concurrent negligence of the other contributed to the injury. p. 569.
4. NEGLIGENCE.—*Injury to Guest in Automobile.*—*Proximate Cause.*—*Verdict.*—*Answers to Interrogatories.*—A verdict against defendant city in favor of plaintiff, who, while riding as a guest in an automobile, was thrown therefrom by reason of sudden

contact of the machine with a hole in the street, was not overcome by the jury's answer to an interrogatory showing that plaintiff's injury was caused by the negligence of the chauffeur, since it does not necessarily follow that the latter's negligence was the sole proximate cause of plaintiff's injury, or that it was more than concurrent negligence operating with that of defendant. p. 569.

5. *NEGLIGENCE.—Injury to Guest in Automobile.—Contributory Negligence.—Answers to Interrogatories.*—Answers to interrogatories showing that an automobile in which plaintiff was riding as a guest at the time he was injured was being driven at an unlawful rate of speed, without objection from plaintiff, do not overcome a general verdict against defendant on the theory that contributory negligence of plaintiff is shown by his failure to remonstrate with the chauffeur and request him either to drive slower or permit plaintiff to leave the machine, when considered in view of the conditions at the time and the facts that plaintiff was a guest in the rear seat, with no control over the chauffeur, and that the machine had been driven at such unlawful speed for only about forty-five seconds, when the accident occurred. p. 570.

From Lake Circuit Court; *Willis C. McMahan*, Judge.

Action by John Geisel against the City of Gary and another. From a judgment for plaintiff, the defendant city appeals. *Affirmed.*

Gavit & Hall and *Harvey J. Curtis*, for appellant.

Hodges & Ridgley, for appellee.

FELT, J.—This is a suit for damages for personal injuries alleged to have been received on account of negligence of appellant. The case was tried on an amended complaint in two paragraphs against appellant and the Gary and Interurban Railway Company, which was answered by a general denial. At the close of the evidence the court directed a verdict for the railway company. The jury returned a verdict for \$500 against appellant and also answered several interrogatories. The error assigned and relied on for reversal of the judgment is the action of the court in overruling appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict.

The first paragraph of complaint charges in substance that appellant is a municipal corporation of the State of Indiana and that Broadway is a street running north and south in the city of Gary; that by permission of said city, the Gary and Interurban Railway Company has constructed and maintains in said street a double track railway, which is crossed at right angles by the Wabash railway with four tracks; that the city caused Broadway to be paved with brick except a strip 26 feet wide in the center thereof where the railway tracks were laid which was to be paved by said railway company and at the time of appellee's injury was paved south of the Wabash railway to within about six feet of the south rail of the south track; that the unpaved portion of the street was six inches lower than the paved portion thereof and the several railway tracks were six inches above the surface of the hole left where the street was not paved; that more than three months prior to appellee's injury the street railway company piled bricks on said street and they remained there until after appellee was injured, all of which was known to appellant; that on the evening of March 8, 1910, it was very dark in the vicinity of the pile of bricks and the hole in the street and there was no guard or light at either of them; that at about 6:30 p.m. on said day, appellee was riding in the rear seat of an automobile as a guest and had no control of the same and had no knowledge of its speed or place upon the street; that the chauffeur drove north on Broadway and when approaching said pile of bricks turned slightly to the left to avoid the obstruction and the automobile ran into said hole before it could be stopped, the forward wheels struck the rail and threw appellee out and injured him; that appellee did not know of the pile of bricks or of the hole in the street before he was injured nor did the chauffeur have any knowledge thereof prior to the accident; that appellant negligently permitted the hole to be and remain in the street with full knowledge of

its condition for many weeks prior to appellee's injury and negligently failed to guard the same or to provide a light or warning of any kind. The second paragraph is substantially the same as the first except it is alleged that the accident was caused by the automobile running into the pile of bricks.

In answer to the interrogatories the jury found in substance that at the time he received his injuries, appellee was a passenger in an automobile traveling north on Broadway in the city of Gary; that the point where he received his injuries was a built-up business portion of the city, which extended from the Wabash tracks south to Eleventh avenue, a distance of about 1,200 feet; that the automobile was moving at a rate of speed of about eighteen miles per hour; that appellee was riding in the back seat and there was nothing to prevent conversation between him and the chauffeur; that at no time before the accident did appellee inform the chauffeur that he desired him to slacken his speed; that appellee's injuries were sustained because of the high speed and reckless driving of the automobile in which he was riding; that the brick pile with which the automobile collided was sufficiently lighted by an electric light in the vicinity to make it plainly visible for 100 feet south thereof, which light was thirty-nine feet from the brick pile; that there were lights burning on the automobile at the time of the accident; that it was dark when the automobile collided with the brick pile and the space between the brick pile and the east curb was seventeen feet.

Two propositions are urged by appellant in support of its motion for judgment on the answers to the interrogatories: (1) The answers show conclusively that the sole proximate cause of appellee's injury was the speed of the automobile. (2) That the automobile was driven at an unlawful rate of speed for 1,200 feet before it reached the place of the accident and appellee was guilty of contributory negligence in failing to remonstrate with the chauffeur

against such unlawful speed. In determining the

1. questions presented we must be guided by the rules that answers to interrogatories will not defeat a general verdict unless they are in irreconcilable conflict therewith. The general verdict will not be overcome by isolated facts disclosed by answers to interrogatories, unless such facts are shown to be so repugnant and contradictory to the general verdict that both can not be true under any conceivable state of facts provable under the issues.

2. All reasonable presumptions are to be indulged in favor of the general verdict for it finds every material issuable fact in favor of the prevailing party. *Simplex, etc., Appliance Co. v. Kameradt* (1913), 180 Ind. 296, 102 N. E. 129.

Where an injury is caused by concurrent negligence of two parties the injured person may recover from either or both and neither can successfully interpose as a

3. defense, the fact that concurrent negligence of the other contributed to the injury. *Louisville, etc., Lighting Co. v. Hynes* (1911), 47 Ind. App. 507, 515, 91 N. E. 962; *City of Logansport v. Smith* (1911), 47 Ind. App. 64, 73, 93 N. E. 883; *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392; 97 N. E. 822.

Appellant insists that the answer to interrogatory No. 10 to the effect that appellee's injuries were sustained because of the high speed and reckless driving of the auto-

4. mobile in which he was riding, is in irreconcilable conflict with the general verdict and shows that such speed and reckless driving were the sole proximate causes of appellee's injury. The answer does show that appellee's injuries were sustained because of the high speed and reckless driving of the automobile, which must be attributed to the negligence of the chauffeur, but it does not necessarily follow from this answer that such negligence was the sole and only cause of appellee's injury or that the negligence of the chauffeur did not operate concurrently

with one of the alleged negligent acts of appellant in producing the injury. *Hammond v. Kingan & Co.* (1913), 53 Ind. App. 252, 255, 258, 101 N. E. 385; *Lake Shore, etc., R. Co. v. McIntosh* (1895), 140 Ind. 261, 268, 272, 38 N. E. 476; *Evansville, etc., R. Co. v. Allen* (1905), 34 Ind. App. 636, 640, 73 N. E. 630; *Indianapolis, etc., R. Co. v. Waddington* (1907), 169 Ind. 448, 463, 82 N. E. 1030. We therefore conclude that the answer does not show that the injury resulted solely from causes for which appellant was not responsible, and that as against the general verdict it only amounts to a finding that the negligence of the chauffeur concurred with that of appellant, in causing appellee's injuries. The question was so framed as to call for an affirmative or negative answer as to whether appellee's injuries were sustained because of the high speed and reckless driving of the automobile, but it did not direct the attention of the jury to the proposition of the sole and only cause of such injuries, which could readily have been done by apt and appropriate language, if a finding on that question had been intended or desired.

On the second proposition appellant does not contend that the negligence of the chauffeur may be imputed to appellee,

but asserts that the answers show conclusively that

5. appellee was himself guilty of contributory negligence in not remonstrating with the chauffeur and requesting him to drive slower or permit appellee to alight from the automobile. The facts relied on are those that show that the automobile moved at the rate of speed of about eighteen miles per hour for 1,200 feet along Broadway, just before the accident occurred, which was in violation of the speed law of Indiana. §10465 Burns 1908, Acts 1907 p. 558; §10476c Burns 1914, Acts 1907 p. 558. At the rate of speed shown the automobile would travel a mile in about three and one-third minutes and would travel the distance of 1,200 feet in about forty-five seconds. Considering that appellee was a guest seated in the rear seat

City of Gary v. Geisel—59 Ind. App. 565.

of the automobile, with no control over the chauffeur, and that the answers as well as the general verdict show that it was dark until the automobile was within 100 feet of the pile of brick, which was south of the hole in the street, it can not be said that the answers conclusively show appellee guilty of contributory negligence as against the general verdict which finds him free from such negligence. To say that he was guilty of contributory negligence on the facts found, is to say that in riding 1,200 feet under the conditions shown without determining that the speed was excessive and remonstrating with the driver and requesting that he slacken the speed or let appellee alight from the automobile, he did not use ordinary care and that a person of ordinary prudence in the exercise of ordinary care for his own safety would have done so within the time and distance above indicated. *Chicago, etc., R. Co. v. Fretz* (1910), 173 Ind. 519, 526, 90 N. E. 76; *Lake Erie, etc., R. Co. v. Oland* (1912), 49 Ind. App. 494, 499, 97 N. E. 543; *Miller v. Louisville, etc., R. Co.* (1891), 128 Ind. 97, 100, 27 N. E. 339, 25 Am. St. 416; *Louisville, etc., R. Co. v. Creek* (1892), 130 Ind. 139, 143, 29 N. E. 481; *Lake Shore, etc., R. Co. v. Boyts* (1897), 16 Ind. App. 640, 647, 45 N. E. 812, and cases cited; *Brannen v. Kokomo, etc., Gravel Road Co.* (1888), 115 Ind. 115, 117, 17 N. E. 202; 3 Elliott, Railroads §1174.

Appellant relies mainly on the cases of *City of Vincennes v. Thuis* (1902), 28 Ind. App. 523, 63 N. E. 315, and *Flynn v. Chicago City R. Co.* (1911), 250 Ill. 460, 95 N. E. 449. The facts of these cases are quite different from those of the case at bar. In the first case the injured person and the driver who were both intoxicated were seated by the side of each other in a buggy drawn by one horse, which was driven rapidly in the nighttime over an unimproved street which was known to be obstructed, and the injury resulted from a collision with a hydrant located at a proper place on the street. The court held that the driver

was negligent and that the injured party knew there was danger of being injured and acquiesced in the negligent conduct of the driver and could not therefore recover. In the latter case two men were taking turns about driving a horse which one was trying to sell the other. Both were intoxicated to some extent and the court held that they were engaged in a common enterprise and that the person injured though not driving at the time of the accident, was barred from a recovery, not on the ground of imputed negligence, but because of his own negligence which is clearly shown by the facts of the case.

The opinion reviews the decisions on the subject and when the law as therein declared is applied to the facts of this case it sustains the trial court in overruling appellant's motion for judgment on the answers of the jury to the interrogatories. Judgment affirmed.

NOTE.—Reported in 108 N. E. 876. As to concurrent negligence, see 16 Am. St. 250. On the effect of concurring negligence of third person on the liability of one sued for negligently causing injury, see 17 L. R. A. 33. As to imputed or contributory negligence of passenger riding in automobile driven by another precluding recovery against third person for injury, see L. R. A. 1915 B 953. Contributory negligence of driver as imputable to occupant of vehicle, see 3 Ann. Cas. 703; 9 Ann. Cas. 408. See, also, under (1) 38 Cyc. 1929; (2) 38 Cyc. 1928; (3) 29 Cyc. 487; (4) 29 Cyc. 657.

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY v. COLLINS.

[No. 8,483. Filed March 31, 1915. Rehearing denied June 18, 1915. Transfer denied October 13, 1915.]

1. CARRIERS.—*Injuries to Passengers.—Negligence.—Evidence.*—Evidence that plaintiff, a girl twenty years old, was riding as a passenger on defendant's train, which was crowded with people to such an extent that passengers were standing in the aisles and on the platforms of the cars; that the train arrived at the station where plaintiff desired to alight at nine o'clock at night and stopped so that the coach in which plaintiff rode was south of a

cattle-guard and wing fence south of the station platform; that the station was not called; that fifty passengers left the train which stood at the station about three minutes; that, on learning that the station was the one at which she desired to alight, plaintiff proceeded to crowd herself down the aisle to the platform, which was crowded with passengers; that as she reached the door the train started; that she stepped down upon the platform steps and, noticing the wing fence, believed the train would stop, and thinking that its speed was slackening, stepped down a step; and that, on realizing that it was passing the depot and would not stop, and believing that it was going slow enough, she jumped and was injured; was sufficient to warrant the submission of the case to the jury on the issue of defendant's negligence. p. 575.

2. **APPEAL.—Verdict.—Evidence.—Review.**—The court on appeal in determining whether the evidence is insufficient to sustain the verdict, as showing the injury resulted from plaintiff's contributory negligence, must determine such question of contributory negligence from a consideration of the evidence most favorable to plaintiff, and plaintiff's own testimony, being the most favorable to her upon the question, must for that purpose be taken as true. p. 578.
3. **CARRIERS.—Injury to Passenger.—Alighting from Moving Train.—Contributory Negligence.**—It is not negligence *per se* for a passenger to alight from a slowly moving train, and, though there are circumstances where it may be said as a matter of law that a person in thus alighting is or is not guilty of contributory negligence, the question of one's contributory negligence in such case is ordinarily one of fact for the jury to determine. p. 578.
4. **CARRIERS.—Injury to Passengers.—Alighting from Moving Train.—Contributory Negligence.**—Ordinarily in determining whether a passenger is guilty of contributory negligence in alighting from a moving train, the speed of the train, the presence or absence of light, the place of alighting, whether the passenger is induced, invited or ordered by the trainmen to get off the train, whether there is any real or apparent emergency of peril to be met, the age and physical condition of the passenger, etc., are merely facts for the consideration of the jury. p. 580.
5. **CARRIERS.—Injury to Passengers.—Alighting from Moving Train.—Contributory Negligence.**—Where the undisputed facts taken with such of the disputed facts as are most favorable to plaintiff, lead inevitably and certainly to the conclusion that a person of ordinary prudence would not have leaped from the train, it is the duty of the court to pronounce the plaintiff guilty of contributory negligence as a matter of law. p. 580.
6. **CARRIERS.—Injury to Passenger.—Alighting from Moving Train.—Contributory Negligence.**—Plaintiff, a girl of twenty years, was

gully of contributory negligence as a matter of law, where it appeared from the evidence most favorable in her behalf, that while riding as a passenger on defendant's train, she leaped from the train into the darkness, impelled by the mere fear that she would be carried beyond her destination, and without any knowledge as to whether the train would stop, and while it was traveling at from eight to ten miles per hour, and that there was nothing to show that she was induced or invited into a place of danger, or that she found herself facing any threatened peril. p. 581.

7. **APPEAL.**—*Assignment of Errors.*—*Waiver.*—An error assigned is waived by appellant's failure to set out in its brief, under a separate heading of such error, separately numbered propositions or points relating thereto. p. 582.

From Greene Circuit Court; *Charles E. Henderson*, Judge.

Action by Goldie Collins, by her next friend, James S. James, against the Chicago, Terre Haute and Southeastern Railway Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Webster V. Moffett and Lamb, Beasley, Douthitt & Crawford, for appellant.

William L. Cavins, William L. Slinkard and A. T. Mayfield, for appellee.

CALDWELL, P. J.—Appellee recovered a judgment in the trial court for \$1,650, by reason of personal injuries suffered by her in alighting from appellant's train at Midland, Indiana. The complaint is in two paragraphs. The negligence charged in the first paragraph is, in substance, the failure of appellant to stop its train at Midland Station a sufficient length of time to enable appellee to alight in safety; permitting the aisle and platform of the car to be crowded with other passengers, and thus obstructing appellee in her passage from the car; starting the train as appellee was about to step from the car, and under such circumstances permitting the car platform to become crowded so that she could not reënter the car, and thereupon materially increasing the speed of the train, whereby appellee was thrown to the station platform and injured.

By the second paragraph it is charged that the train was stopped before the car in which appellee was riding had reached the station platform; that nevertheless, she started to leave the car but was delayed by reason of the crowded condition of the aisle and car platform; that appellant failed to stop the train long enough for appellee to alight; that appellant started the train as appellee stepped onto the car platform; that believing that appellant intended to pull the car up to the station platform and then stop it, she continued down onto the car steps, whereupon appellant, without stopping said train, increased its speed with a sudden and violent jerk, whereby she was thrown to the station platform and injured. Appellant's acts and omissions complained of in the complaint are alleged to have been negligently done and omitted respectively.

The only error assigned and not waived is the overruling of the motion for a new trial. Under such motion, it is argued that the verdict is not sustained by sufficient

1. evidence. It is urged that the evidence established affirmatively that appellee was guilty of negligence contributing to her injury as the proximate cause thereof. The evidence bearing on such issue is substantially as follows: Without contradiction, it appeared that on July 4, 1911, appellee, a girl twenty years old, was living in the home of Mrs. Henderson, at Bloomfield. On that day, she started for Midland to attend the funeral of her brother's child. At Linton she became a passenger on appellant's train, having a ticket entitling her to transportation to Midland, a few miles distant. The train included five coaches and a baggage car. By reason of persons returning from a celebration at Linton, the train was crowded, to the extent that the seats were all occupied, and there were passengers standing in the aisles, and on the platforms of the coaches. Appellee entered the rear car, but by reason of its crowded condition, she was unable to obtain a seat, and remained standing in the aisle. In due course, the

conductor took up the tickets, and left the car, and thereafter no train official entered the rear coach. The station at Midland is on the west side of the railroad. South of the platform is a narrow highway intersecting the railroad, and south of the highway are cattle guards and wing fences. The train reached Midland after nine o'clock at night, and stopped so that the rear coach was south of the cattle guards. There was a lot of evidence that Midland Station was not called. An assistant conductor testified that after the train had stopped, he stood on or near the wing fences and called the station through the windows of the rear coach. There were about fifty passengers for Midland who there left the train. Witnesses in estimating the time the train stood at Midland Station, and the speed at which it was running when appellee jumped from it, as hereinafter set out, differed somewhat, the extremes of the former being two and five minutes, and of the latter ten and twenty miles per hour. In answer to interrogatories the jury found that the train stood at the station three minutes, and that it was running eight miles an hour when appellee left it. The witnesses agreed that while appellee was standing on the platform and steps preparatory to jumping from the train, its speed increased. The answers to the interrogatories disclose that the rear coach stood eighty-five feet south of the south end of the platform, that the platform was 165 feet long, and that the point at which appellee left the train was 250 feet north of the north end of the platform. These answers are in harmony with the evidence. It thus appears that the train had run 500 feet before appellee jumped from it. A passenger who was standing on the car platform when appellee came to the platform from the car, testified that she asked if this was Midland, and being informed that it was, that she said, "I must get off here." That he told her not to undertake it; that she was preparing to jump when he placed his arm in front of her, and told her it meant death for her to jump and that he would stop the

train; that he then turned to direct a passenger to pull the bell rope, and that appellee leaped from the train as he turned. This witness was corroborated in the main by two other witnesses who were passengers. Appellee, as a witness, denied this conversation, and the jury in answer to an interrogatory found that appellee was not warned by a fellow passenger not to attempt to get off the train after it had left the station. Appellee's testimony in her own behalf is in part substantially as follows: Midland Station was not called. After the train had stopped, she learned from a fellow passenger within the car, by inquiry, that the stop was for Midland. She then proceeded to crowd her way down the aisle to the front platform. The platform was crowded with passengers. As she reached the door the train started. She proceeded to the first or second step, and discovered that the car was passing the cattle guards, and she thereby knew that the station platform had not been reached. She hesitated, thinking that the train would stop at the station platform. She believed the train was checking its speed, and thereupon stepped down a step. The train did not stop. She held to the north handhold with her right hand, and had a bundle in her left hand, consisting of a shirt waist wrapped in paper. "I waited until just as the train passed the depot, and thinking it was going slow enough, and thinking I was getting off on the platform jumped." As she jumped the train increased its speed with a jerk. "Q. You stepped off or jumped off? A. Jumped off, thinking I was jumping on the platform." From shortly after the train passed the cattle guards "it all looked the same, and I thought it was the platform." There were grown people and children on the car steps as she jumped off. Appellee had made a former trip to Midland over appellant's railroad, arriving at night, and leaving in the morning. She knew that the station platform extended both north and south of the depot. On her cross-

examination, she stated that it was dark when the train reached Midland. Being asked whether she reentered the car after going down the steps, she replied: "I could not get back in the train." Being asked whether she started back in the train, she answered: "I looked back and people were crowded behind me and children pushing against me." She could not see the ground. Everything looked smooth and dark alike, and she thought she was jumping on the platform. She thought the car had just passed the depot. Appellee in fact jumped into a side ditch. Her injuries were serious, among them the fracture of both bones of the right leg about three inches above the ankle, and from which she had not entirely recovered at the time of the trial nine months later.

Considering the crowded condition of the train, the darkness, the apparent failure properly to call the station, the evidence as to the length of the stop, under the circumstances, and the evident lack of attention given appellee, the case was properly submitted to the jury on the

2. issue of appellant's negligence. The question of contributory negligence must be determined from a consideration of the evidence most favorable to appellee. Down to the point in the evidence, when appellee was preparing to leap from the train, there is no material contradiction. That she voluntarily leaped from the train is not denied. There is controversy respecting the circumstances immediately preceding and attending that transaction. As to these circumstances, appellee's own testimony is the most favorable to her cause, and in determining such controversy, her testimony must be taken as the true account of such circumstances.

In discussing the responsibility incurred by a passenger in jumping from a moving train, the language used by the courts of this State, on first view, indicates a lack

3. of harmony in the conclusion reached. The expression, however, in each instance, must be construed

with reference to the facts of the particular case, and thus it will be discovered that the disparity is apparent rather than real. Thus, it is not negligence *per se* for a passenger to alight from a slowly moving train. *Lake Erie, etc., R. Co. v. Huffman* (1912), 177 Ind. 126, 97 N. E. 434, Ann. Cas. 1914 C 1272; *Louisville, etc., R. Co. v. Bean* (1893), 9 Ind. App. 240, 36 N. E. 443. "It is carelessness in passengers to attempt to leave the train whilst it is in motion." *Jeffersonville, etc., R. Co. v. Hendricks* (1866), 26 Ind. 228. This language was modified on a subsequent appeal. See *Jeffersonville, etc., R. Co. v. Hendricks* (1872), 41 Ind. 48, 66, the court saying: "It seems to us that the above proposition of law was too broadly stated, and should have been modified." The court further said that the true rule is as declared in *Evansville, etc., R. Co. v. Duncan* (1867), 28 Ind. 441, 447, 92 Am. Dec. 322, as follows: "If the leap was made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the defendant from responsibility otherwise resting upon it." In *Pittsburgh, etc., R. Co. v. Miller* (1904), 33 Ind. App. 128, 131, 70 N. E. 1006, this court said: "It is a general proposition deducible from the authorities that to get off a passenger train before it is brought to a standstill at the station is contributory negligence. An exception arises where the act is induced by the company through its agents." Other exceptions indicated are where the passenger is directed by the trainmen to alight, and where his action is affected by his tender age or other incapacity. Perhaps it would not be possible to frame a general rule applicable to all situations. There are circumstances under which it may be said as matter of law that a person in alighting from a moving train is thereby guilty of contributory negligence. *Louisville, etc., R. Co. v. Crunk* (1889), 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443; *Harris v. Pittsburgh, etc., R. Co.* (1904), 32 Ind.

Chicago, etc., *R. Co. v. Collins*—59 Ind. App. 572.

App. 600, 603, 70 N. E. 407; *Dunning v. Lake Erie, etc., R. Co.* (1906), 38 Ind. App. 91, 77 N. E. 1049. Perhaps also the circumstances might be such that it would be held as matter of law that a person in stepping from a moving train was not guilty of contributory negligence. It would seem, however, that the question of whether a passenger in jumping or stepping from a moving train is guilty of negligence contributing to an injury thereby received, is ordinarily a question of fact for the jury. In determining

such question in the ordinary case, the speed of the
4. train, the presence or absence of light, the place of alighting, whether the passenger is induced, invited or ordered by the trainmen to get off the train, whether there is any emergency or apparent emergency of peril to be met, the age and physical condition of the passenger, etc., are merely facts for the consideration of the jury. *Lake Erie, etc., R. Co. v. Huffman, supra*; *Louisville, etc., R. Co. v. Crunk, supra*; *Reibel v. Cincinnati, etc., R. Co.* (1888), 114 Ind. 476, 17 N. E. 107; *Harris v. Pittsburgh, etc., R. Co., supra*; 5 R. C. L. 36, *et seq.*; 6 Cyc. 648; *Carr v. Eel River, etc., R. Co.* (1893), 21 L. R. A. 354, note; *Hoylman v. Kanawha, etc., R. Co.* (1909), 22 L. R. A. (N. S.) 741, note; *Pennsylvania Co. v. Marion* (1890), 123 Ind. 415, 23 N. E. 973, 18 Am. St. 330, 7 L. R. A. 687. It follows that each case must be determined from a consideration of its own facts. *Harris v. Pittsburgh, etc., R. Co., supra*.

While, as indicated, the question of contributory
5. negligence is ordinarily one of fact for the jury, yet applying general principles to this case, if the undisputed facts taken with such of the disputed facts as are most favorable to appellee lead inevitably and certainly to the conclusion that a person of ordinary prudence situated and circumstanced as was appellee would not have leaped from the train, then it is our duty to pronounce appellee guilty of contributory negligence. *Louisville, etc., R. Co. v. Bean, supra*; *Harris v. Pittsburgh, etc., R. Co., supra*.

Chicago, etc., R. Co. v. Collins—59 Ind. App. 572.

Appellee, while within the car and consequently in a place of safety ascertained that the train was moving. With-

out any knowledge of whether it would stop, she

6. came to the platform and steps. From such position,

she voluntarily leaped from the train when it was moving at least ten miles per hour as shown by the evidence, and eight miles per hour as found by the jury, and without any accurate knowledge as to the actual speed of the train. She knew that she was leaping into the darkness and that she could not ascertain definitely the nature of the place towards which she was jumping. There is nothing to indicate that she was induced or invited into a place of danger, or that she found herself facing any threatened peril, or at least that any such danger or peril induced her to leap from the train. See *Louisville, etc., R. Co. v. Lamb* (1889), 6 L. R. A. 195, note. Apparently she was impelled by the mere fear that she would be carried beyond the station at which she desired to leave the train. Such a fear was not sufficient to justify her in leaping from the train under the circumstances here presented. If wrongfully carried beyond her station, she would not have been without her remedy. *Jeffersonville, etc., R. Co. v. Hendricks, supra*; *Reibel v. Cincinnati, etc., R. Co., supra*; *Harris v. Pittsburgh, etc., R. Co., supra*; *Toledo, etc., R. Co. v. Wingate* (1895), 143 Ind. 125, 37 N. E. 274, 42 N. E. 477.

In our judgment the evidence shows affirmatively that appellee was guilty of contributory negligence, and that as a consequence the judgment must be reversed. See *Dunning v. Lake Erie, etc., R. Co., supra*; *Reibel v. Cincinnati, etc., R. Co., supra*; *Jeffersonville, etc., R. Co. v. Swift* (1866), 26 Ind. 459; *Pennsylvania Co. v. Hixon* (1894), 10 Ind. App. 520, 38 N. E. 56; *Pittsburgh, etc., R. Co. v. Miller, supra*; *Evansville, etc., R. Co. v. Duncan* (1867), 28 Ind. 441; *Toledo, etc., R. Co. v. Wingate, supra*.

Certain instructions are perhaps justly criticised, but as the questions respecting them may not arise on a retrial,

Chicago, etc., *R. Co. v. Collins*—59 Ind. App. 572.

we do not consider them. The judgment is reversed with instructions to sustain the motion for a new trial, and to grant appellee permission to amend the complaint if desired.

ON PETITION FOR REHEARING.

CALDWELL, J.—Appellant, on petition for a rehearing, earnestly insists that the court erroneously held by the original opinion that appellant waived the assign-

7. ment that the court erred in overruling the motion for judgment on the answers of the jury to the interrogatories notwithstanding the general verdict. Clause 5, Rule 22 provides, among other things, that appellant's brief shall contain "under a separate heading of each error relied on, separately numbered propositions or points, stated concisely", etc. An inspection of appellant's original brief readily discloses a complete failure to comply with the quoted provision of the rule. Under such circumstances, this court was justified in concluding that appellant did not rely on that assignment, and to treat it as waived. *Stauffer v. Hulwick* (1911), 176 Ind. 410, 96 N. E. 154, Ann. Cas. 1914 A 951; *Stewart v. Stewart* (1911), 175 Ind. 412, 94 N. E. 564; *Owen v. Harriott* (1911), 47 Ind. App. 359, 94 N. E. 591; *Town of Clarksville v. Ohio Falls Mfg. Co.* (1914), 56 Ind. App. 198, 105 N. E. 67. Petition overruled.

NOTE.—Reported in 108 N. E. 377, 1135. As to duties of railroad companies to passengers alighting from their trains, see 50 Am. Rep. 277. Contributory negligence in alighting from moving train where act is obviously dangerous, see 1 Ann. Cas. 778; 17 Ann. Cas. 1154. Contributory negligence in alighting from moving train by advice or command of carrier's servant, see 1 Ann. Cas. 791. See, also, under (1) 6 Cyc. 585, 612, 648; (2) 3 Cyc. 348; (3, 5, 6) 6 Cyc. 648; (4) 6 Cyc. 649; (7) 3 C. J. 1410, 1421; 2 Cyc. 1014.

KOKOMO BRASS WORKS v. DORAN.

[No. 8,366. Filed May 14, 1914. Rehearing denied March 2, 1915.
Transfer denied October 13, 1915.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Common-Law Action.—Complaint.*—A complaint in a servant's action against the master for personal injuries is not good as the statement of a common-law action if it fails to allege that plaintiff did not at and prior to the accident have full knowledge of the conditions complained of, and full appreciation of any danger there might be in working at the place where he sustained the injury complained of. p. 588.
2. MASTER AND SERVANT.—*Injuries to Servant.—Statutes.—Complaint.—Sufficiency.*—The Employer's Liability Act of 1911 (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), must be strictly construed, and a complaint drawn under its provisions, to be sufficient, must affirmatively show facts within its provisions. p. 589.
3. MASTER AND SERVANT.—*Injuries to Servant.—Action Under Statute.—Complaint.—Sufficiency.*—The complaint in an employee's action for injuries from falling, alleging facts to show that defendant was a corporation engaged in business in this State, employing more than fifty persons, that plaintiff's injury was sustained while in the employ of defendant, and that the injury was due to the carelessness, negligence, fault or omission of duty of defendant, was properly construed as drawn within the provisions of the Employer's Liability Act of 1911 (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), and was therefore sufficient without negating assumption of the risk. p. 589.
4. MASTER AND SERVANT.—*Injuries to Servant.—Action Under Statute.—Complaint.—Requisites.—Judicial Notice.*—It is not requisite to the sufficiency of a complaint drawn under the Employer's Liability Act that specific reference be made to the act itself by title and page, but it is sufficient if the allegations bring it within the terms of the act, since the court takes judicial cognizance of the statutes of the State. p. 590.
5. MASTER AND SERVANT.—*Injuries to Servant.—Action Under Statute.—Complaint.—Impairment of Contract.*—A complaint for injuries to a servant drawn under the Employer's Liability Act of 1911 (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), is not insufficient on the ground that, the relation of master and servant having arisen *ex contractu* prior to the passage of the act, to impose liability on defendant thereunder would be to impair the obligations of a contract, since the right to bring an action in the future in case of a possible tort is no part of the contract of

Kokomo Brass Works v. Doran—59 Ind. App. 583.

employment and is subject to legislative change at any time. p. 590.

6. MASTER AND SERVANT.—*Injuries to Servant.—Complaint.—Sufficiency.*—A complaint in a servant's action for personal injuries alleging generally that the injury was due to the fault, negligence and carelessness of the master, is not insufficient as showing that the injury was the result of mere accident, in the absence of specific allegations to overcome the general averment of the master's negligence. p. 591.
7. MASTER AND SERVANT.—*Injuries to Servant.—Verdict.—Answers to Interrogatories.*—Where the complaint for personal injuries to a servant by reason of his foot slipping into an aperture near where he was standing while in the discharge of a certain duty, alleged that "as a direct and proximate result of his foot so entering into said aperture, and the negligence of the defendant in so leaving the same open, plaintiff lost his balance and fell with great force upon said iron grating upon his side and shoulder", etc., answers by the jury to interrogatories finding that plaintiff's injury was caused by falling and that the fall was caused by the plaintiff's foot slipping, but with no reference to the aperture, are in irreconcilable conflict with a general verdict for plaintiff, since reference to such aperture can not be supplied by reference or intendment, nor can it be said to be supplied by the general verdict. (*King v. Inland Steel Co.* [1912], 177 Ind. 201; *Evansville Hoop, etc., Co. v. Bailey* [1909], 43 Ind. App. 153; *Bessler v. Laughlin* [1907], 168 Ind. 38; *Davis v. Mercer Lumber Co.* [1905], 164 Ind. 413; and *Cook v. Ormsby* [1910], 45 Ind. App. 352, distinguished.) p. 592.
8. APPEAL.—*Review.—Instructions.*—An instruction in a servant's action for personal injuries advising the jury that in determining the question of defendant's negligence it could consider certain things "and all other facts and circumstances which you may determine as bearing upon such question", was too broad as not confining the jury to the facts directly pertaining to that question, and its giving was error in view of the many facts introduced that were not proper to be considered on the question of defendant's negligence. p. 595.
9. APPEAL.—*Review.—Harmless Error.—Refusal of Instructions.*—The refusal of an instruction correctly stating that the jury must take the law as given it by the court, and not from the argument of counsel, was not harmful error, where the court gave an instruction covering the point involved, though not in so comprehensive a manner as in the instruction requested. p. 596.
10. MASTER AND SERVANT.—*Injuries to Servant.—Accidental Injury.—Instructions.*—Where the defense in a servant's action for personal injuries was that of purely accidental injury, it was

Kokomo Brass Works v. Doran—59 Ind. App. 583.

error for the court to refuse an instruction stating that before plaintiff could recover he must show that his injuries were traceable directly and proximately to the negligence of the defendant, and that if plaintiff purposely or carelessly did any act which caused him to fall, or that he accidentally lost his balance and fell, and if the falling was not produced by the existence of the alleged defect, then such defect was not the proximate cause of plaintiff's injury and he could not recover. p. 597.

From Howard Circuit Court; *William C. Purdum*, Judge.

Action by John Doran against the Kokomo Brass Works. From a judgment for plaintiff, the defendant appeals. *Reversed.*

William A. Ketcham, *Howe Stone Landers* and *Ralph M. Ketcham*, for appellant.

Wilson & Quinn and *Blacklidge, Wolf & Barnes*, for appellee.

SHEA, P. J.—Appellee brought this action to recover damages for personal injuries received by him while in appellant's employ, by reason of its alleged negligence. Appellant's demurrer to the amended complaint in one paragraph was overruled. The jury returned a general verdict in favor of appellee, also answers to ten interrogatories. Over appellant's motion for judgment in its favor on the answers to the interrogatories notwithstanding the general verdict, and its motion for a new trial, the court rendered judgment in favor of appellee for \$4,000.

The errors assigned are the rulings of the court below on appellant's demurrer to the amended complaint, and on the motions for judgment on the answers to interrogatories notwithstanding the general verdict, and for a new trial.

The complaint is long, and we set out only the facts necessary to an understanding of the questions involved. It is alleged, among other things, in substance, that appellant is a corporation engaged in the manufacture and casting of various articles out of brass and aluminum, operating

in the city of Kokomo, Indiana, where it employs a large number of workmen, to wit, more than fifty. Appellee was in appellant's employ as a molder of aluminum, and in the course of his employment it was his duty to fill molds placed in position on the floor of appellant's molding room with aluminum which had theretofore been melted in ovens situated in said room, and to obey the commands and orders of appellant's employe in charge of the ovens in taking the molten metal out of same. There were eight ovens in a row, so constructed that the top was nearly level with the floor of the molding room, the bottom extending downward in a place excavated beneath the floor. The aluminum was melted in round pots placed in the center of the ovens, around which coke was placed and fired up. Near the bottom of each oven was an aperture for removing the ashes which accumulated. In order that the ashes could be readily removed, appellant constructed an excavation which extended several feet away from the ovens to the side thereof. This excavation or hole was covered with iron grates, which, when properly constructed, would fit around the ovens and prevent any opening between said grates and the side of the oven adjacent thereto. The opening in the floor of the foundry room was four or five feet wide, six or seven feet deep, and about twenty feet long, and covered with iron gratings so placed that it was necessary for appellee in the performance of his duties as molder to cross them in order to get the metal from the said ovens, the grating being level with the floor and top of the ovens. It is charged that on May 18, 1911, and for more than thirty days prior thereto appellant had "carelessly and negligently maintained the grating covering that part of the opening in the floor of the molding room hereinabove described, at and near the last oven and the farthest distant from the place where the molds were placed * * * so that the said grating was not close up or flush with said oven, but said grating extended to within two and one-half or three inches

of said oven''; that said defect in the condition of the grating and oven was well known to appellant and its officers and agents, or by the use of reasonable care might easily have been known by them. The pots of melted aluminum were heavy and brittle and easily broken, and if broken while being removed or lifted out of the ovens, the metal would run down into the furnaces; that by reason of the coke being closely packed around the pots great care was at all times necessary in removing them, and the oven and pots of melted aluminum were extremely hot; that the rim or edge of the ovens around which appellee was required to stand in the performance of his duties in removing said pots was about six inches wide and constructed of iron. In removing the pots of metal from the ovens, it was necessary for appellee, and it was his duty, to stand over the top of the oven, astride an iron bar with a hook attached to the center thereof, and after the covering of the oven had been removed, use a pair of tongs provided by appellant for that purpose, to place the handle of the pot of melted metal within the hook attached to the iron bar, and with the assistance of two other employes furnished by appellant to raise the pot in an exactly vertical direction until it should clear the furnace; then step over said bar so that same could be transported from the furnace to the place where the metal was to be used; that in stepping over the bar it was necessary for appellee to move one of his feet a few inches to the right in order that he might have a proper balance; that on May 18, 1911, appellee was specifically ordered and directed by appellant's employe in charge of the ovens to proceed to the last or eighth oven and take therefrom a pot which had been heated and melted to the proper consistency; that he and the two other employes of appellant furnished for that purpose proceeded to said oven, and appellee standing directly over the top of same removed the lid with a pair of tongs, and took hold of the handle of the pot. The other two employes procured

an iron bar with a hook attached in the center of same and lowered the hook into the oven to a point at which appellee was able to and did with the tongs insert the handle of the pot into the hook. Each of the two employes held one end of the bar, and appellee was standing across the same close to the center of it. Appellee then put aside the tongs and took hold of the iron bar for the purpose of steadying same, and together with the other two employes raised the pot of metal until the top of it was above the floor level and entirely clear of the oven. "That in order to release himself from the position in which he then stood he was compelled to and did shift his foot to the side of the top of the furnace next to the iron grating hereinabove described, and in so doing his foot accidentally and without intention on the part of plaintiff so to do, slipped into the aperture or opening between the furnace and said grating * * *. That as a direct and proximate result of his foot so entering into said aperture, and the negligence of the defendant in so leaving the same open plaintiff lost his balance and fell with great force upon said iron grating upon his side and shoulder", and received his injuries, described.

Appellant's learned counsel argue very earnestly and ably that the amended complaint in this action is obnoxious to a demurrer. In point one, under "Points and Author-

1. ities", and in the argument in support thereof, it is clearly shown that the complaint is not good as a common-law action, inasmuch as it fails to allege that appellee did not at and prior to the accident have full knowledge of the condition complained of, and full appreciation of any danger there might be in working at the place where he sustained the injury complained of. This position is not controverted by appellee's counsel, but it is insisted that the complaint is drawn under the Employer's Liability Act of March 2, 1911. Acts 1911 p. 145, §8020a Burns 1914.

Under points two and three appellant's counsel presents the question that the complaint is not sufficient under the

act of 1911, *supra*. It is correctly stated under point

2. two, with authority to support it, that the act of 1911, being in derogation of the common law must be strictly construed; that if the complaint be drawn under the provisions of said act, its allegations must affirmatively show facts within its terms, and that the court should not be required "to dig out from the averments of the com-

3. plaint its theory". With respect to this contention, we think it is clearly shown that the complaint was rightly construed by the court to be drawn within the provisions of the act of 1911, *supra*. Section 1 of said act contains the following provision: "That any person, firm or corporation while engaged in business, trade or commerce within this state, and employing * * * five or more persons shall be liable and respond in damages to any person suffering injury while in the employ of such * * * corporation * * * where such injury or death resulted in whole or in part from the negligence of such employer or * * * its * * * agents, servants, employes or officers, or by reason of any defect, mismanagement, or insufficiency, due to * * * its * * * carelessness, negligence, fault or omission of duty." Section 3 provides: "Such employe shall not be held to have assumed the risks of any defect in the place of work furnished to such employe", etc. The complaint contains the essential allegations that appellant is a corporation engaged in business within this State, employing more than fifty persons, therefore more than five persons. It contains the allegation that appellee was injured while in the employ of the corporation, and that said injury was due to the carelessness, negligence, fault or omission of duty of appellant. Since the assumption of risk is abolished by the act as shown by the above quotation, and as held by the Supreme Court in the case of *Vandalia R. Co. v. Stillwell* (1914), 181 Ind. 267, 104 N. E. 289, we think the demurrer to the complaint was rightly overruled upon this point. It was not necessary to

refer specifically to the act itself by title and page.

4. The court takes judicial cognizance of the statutes of the State. If the allegations of the complaint bring it within the terms of the act, that is sufficient. *Vandalia R. Co. v. Stillwell*, *supra*; *McChesney v. Illinois Cent. R. Co.* (1912), 197 Fed. 85; *Ervin v. State, ex rel.* (1898), 150 Ind. 332, 340, 48 N. E. 249; *Southern R. Co. v. Ansley* (1909), 8 Ga. App. 325, 68 S. E. 1086; *McConnathy v. Deck* (1905), 34 Colo. 232, 82 Pac. 702.

The propositions argued under point three are as follows: "The complaint construed as stating a cause of action under the act of 1911 is defective, (a) as seeking to

5. impair the contract relation between appellee and appellant; (b) as being in contravention of the express terms of the act itself." It is urged in support of appellant's point "a" that the relation of master and servant having been entered into prior to the enactment of the act of 1911, *supra*, the subsequent passage of said act could not change the contractual relation existing between the master and servant prior to the time of the passage of the act, in other words, that the relation, as stated, having arisen *ex contractu*, the subsequent legislation could not change this relation. This act has been lately construed and upheld by the Supreme Court of this State in the case of *Vandalia R. Co. v. Stillwell*, *supra*. The precise question here involved was not considered by the court in that case, but the principle underlying appellant's contention has been decided adversely to it in the case of *Borgnis v. Falk Co.* (1911), 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489, where the court uses this language at page 366: "The right to bring an action in the future in case of a possible tort not yet committed is no part of the contract of employment. That right arises out of the relation of employer and employee and is subject to change by the lawmaking power at any time. The employer does not contract that it shall remain intact. There is no vested

right in a mere remedy for a hypothetical wrong. At most the law can not be said to do more than change the remedy for a tort which is yet to happen, and may never happen. The legislature may change the remedies for torts yet to be committed at any time, and such changes cannot be said to make any change in mere contracts of service existing between the parties." The supreme court of Massachusetts in the case *In re Opinion of Justices* (1911), 209 Mass. 607, 96 N. E. 308, in construing a workmen's compensation bill pending in the Massachusetts legislature, announces the same doctrine, as does also the New York Court of Appeals in a case in which it was contended that the requirement to have hand rails to stairs, hoisting shaft, etc., could not, under a statute, be applied to buildings and factories already in existence at the time the statute was passed. See *Health Dept. v. Rector of Trinity Church* (1895), 145 N. Y. 32, 39 N. E. 833, 45 Am. St. 579, 27 L. R. A. 710. The New York Court of Appeals based its decision on the proper exercise of the police power for the preservation of the safety and welfare of its citizens.

It is also insisted under point "b" that the complaint was bad because the injury was the result of a mere accident, for which the master can not be made to respond

6. in damages. The complaint contains the general allegation that the injury was due to the fault, negligence and carelessness of the master in leaving a certain aperture in the grating, which caused the fall, resulting in the injury complained of. We can not say that the allegations of the complaint show that the injury resulted from a mere accident. The specific allegations do not overcome the general averment of the master's negligence, and the complaint is therefore sufficient. *Cleveland, etc., R. Co. v. Wynant* (1885), 100 Ind. 160, 163; *Indianapolis St. R. Co. v. Ray* (1906), 167 Ind. 236, 243, 78 N. E. 978; *Baltimore, etc., R. Co. v. Slaughter* (1906), 167 Ind. 330, 339, 342, 79 N. E. 186, 119 Am. St. 503, 7 L. R. A. (N. S.) 597.

It is next insisted that the answers of the jury to interrogatories are in irreconcilable conflict with the general verdict. The interrogatories and answers thereto read

7. as follows: "1. Was not plaintiff in the employ of said defendant as a molder from some time in February until the 18th day of May, 1911? A. Yes. 2. Did not the plaintiff know of the condition of the opening between the grating and the corner of the oven as described in his complaint for a period of more than two months, immediately prior to the 18th day of May, 1911? A. Yes. 3. Did the plaintiff at any time make any request of said defendant to repair said opening? A. No. 4. Was not the plaintiff on and for more than two weeks immediately prior to the 18th day of May, 1911, a man of mature years, of ordinary intelligence and in full possession of his faculties? A. Yes. 5. Was not the plaintiff working at furnace number seven at the time he received the fall described in his complaint? A. No. 6. Was not the plaintiff standing on the south side of the center of the furnace top at which he was working immediately before he fell? A. Yes. 7. Was not the top of the furnace at which the plaintiff was working immediately before receiving this fall about three (3) feet square? A. Yes. 8. Was there any open space between the east side of furnace number seven and the grating to the east thereof until within a few inches of the northeast corner of said furnace? A. No. 9. Was not the injury received by plaintiff at the time described in the complaint caused by plaintiff falling? A. Yes. 10. If you answer the preceding interrogatory yes, was not said fall caused by the plaintiff's foot slipping on the top of the furnace at which he was working? A. Yes."

It will be observed that the jury in response to interrogatory No. 9 answers that the injury to appellee was caused by his falling. In response to interrogatory No. 10 the jury finds that appellee's fall was caused by his foot slipping. The charge of negligence in the complaint is that

“on the 18th day of May, 1911 * * * defendant company had carelessly and negligently maintained the grating covering that part of the opening in the floor of the molding room * * * at and near the last oven and the farthest distant from the place where the molds were placed as heretofore described so that the said grating was not close up or flush with said oven, but said grating extended to within two and one-half or three inches of said oven. That said defect in the condition of said grating and oven was well known to the defendant and its officers and agents, or by the use of reasonable care might easily have been seen or known by the defendant, its officers or agents. That in order to release himself from the position in which he then stood, he was compelled to, and did shift his foot to the side of the top of the furnace next to the iron grating hereinabove described, and in so doing his foot accidentally and without any intention on the part of plaintiff so to do, slipped into the aperture or opening between the furnace and said grating, which said aperture is hereinabove described. That as a direct and proximate result of his foot so entering into said aperture, and the negligence of the defendant in so leaving the same open, plaintiff lost his balance and fell with great force upon said iron grating upon his side and shoulder”, thereby causing his injuries.

The allegation in the complaint that “as a direct and proximate result of his foot so entering into said aperture, and the negligence of the defendant in so leaving the same open, plaintiff lost his balance and fell with great force upon said iron grating upon his side and shoulder,” we must accept as proved under the general verdict. The facts found by the jury in answer to interrogatories Nos. 9 and 10 are in irreconcilable conflict with the general verdict, because it is there found that the fall was caused by the foot slipping, with no reference to the aperture, and said reference can not be supplied by inference or intendment,

neither can it be said that it was supplied by the general verdict.

We are not unmindful of the well-established rule that in considering the effect of the jury's answers to interrogatories upon the general verdict, we must take as proved every material fact upon which evidence might have been properly heard, and if, when so considered, no irreconcilable conflict is found, then the general verdict prevails. In this case we can conceive of no evidence which could be heard changing the cause and manner of appellee's fall and consequent injury, which would not be in irreconcilable conflict with the jury's finding in the answers to the interrogatories. Appellee's able counsel state in their brief that "even if the slipping was the proximate cause, it only concurred with the negligence of the defendant", and to sustain the general verdict, this court must in effect so find. In the face of the finding of the jury that the slipping of the foot was the cause of the fall which caused the injury, we can not say that the jury might have found by the general verdict that there was some other or additional cause of the injury, and then say that the findings in answer to the interrogatories were not in irreconcilable conflict therewith. We can conceive of no state of facts that might have been proved under the allegations of the complaint that can bring the answers to the interrogatories above cited in harmony with the general verdict so as to permit both to stand.

The facts in this case are so essentially different from the facts in the case of *King v. Inland Steel Co.* (1912), 177 Ind. 201, 96 N. E. 337, 97 N. E. 529, cited and relied on by appellee, that it can not be said to support his contention in counsels' able effort to reconcile the answers to the interrogatories with the general verdict. The act of negligence complained of in the case of *King v. Inland Steel Company*, *supra*, was the failure to guard certain cogwheels in violation of the factory act of 1899. Acts 1899 p. 231.

It clearly appears from the facts in that case that no matter what caused appellant to fall, his coming in contact with the uncovered cogwheels was the proximate cause of the injury, and the uncovered condition of the cogwheels was due to the negligence of appellee. In the present case the jury found appellee's fall was due to the fact that his foot slipped. He did not come in contact with any cogwheel or piece of machinery negligently left unguarded, but, as the jury found, his injury was caused by his body coming in contact with the top of the furnace, or iron grating upon which he was at work, due to the fall caused by his foot slipping and not by the aperture at the side of the grating. It is not alleged that the iron grating was irregularly constructed or maintained. It can not be said that his injury might not have been sustained with equal severity if there had been no aperture at the side of the grating into which his foot is alleged to have slipped. The finding that the fall was caused by appellee's foot slipping is conclusive upon that question in considering the effect to be given to the answers of the jury to the interrogatories.

The case of *Evansville Hoop, etc., Co. v. Bailey* (1909), 43 Ind. App. 153, 84 N. E. 549, cited by appellee is likewise readily distinguishable in its facts from the case at bar, as are also the cases of *Bessler v. Laughlin* (1907), 168 Ind. 38, 79 N. E. 1033; *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413, 73 N. E. 899; *Cook v. Ormsby* (1910), 45 Ind. App. 352, 89 N. E. 525.

Under its motion for a new trial appellant assigns: (1) the verdict is contrary to law; (2) the verdict is not sustained by sufficient evidence; (3) error of the court in the admission of certain evidence; (4) error of the court in giving to the jury instructions Nos. 6, 10 and 12 requested by appellee, and in refusing to give instructions Nos. 15 and 23 requested by appellant. Instruction No. 6 reads

8. as follows: "In determining whether or not the maintenance by defendant of the grating, such as

has been shown in the evidence in this case, was negligent, you have a right to consider all the facts and circumstances shown in evidence, which throw any light upon that question. You may consider the construction of the furnaces used, the character of the employment of the men at work at such furnaces, the number of men there employed, *and all other facts and circumstances which you may determine as bearing upon such question.*" The parts especially objected to are italicized. It is well stated by appellant that this instruction gave to the jury an unlimited discretion to say that any evidence that had been submitted to them on other points might be proper for them to consider in determining the question of negligence. Many facts were introduced in evidence in the case which would not be proper for the jury to consider in determining the question of appellant's negligence. The latter part of the instruction is too broad as not confining the jury to the facts directly pertaining to that question. Instruction No. 12 is subject to the same infirmity, and is justly criticised. Instruction No. 10 given by the court is not erroneous. In-

struction No. 15 requested by appellant and refused

9. by the court, which sought to have the jury instructed that it must take the law as given it by the court in its instructions, and not from the argument of counsel, correctly stated the law, but we are unable to say that harmful error resulted from the refusal to give this instruction, as the court in instruction No. 2 given on its own motion covered the point involved, not so completely as requested by appellant's instruction, but omitting only that the jury was not to take the law from the argument of counsel. As to whether the more comprehensive instruction should have been given must depend in a large measure upon the facts occurring at the trial, and must therefore be left to the sound discretion of the trial court.

Instruction No. 23 requested by appellant and refused by the court reads as follows: "In this action the complaint

alleges that the defendant carelessly and negligently
10. maintained the grating in question 'so that the said grating was not close up flush with the oven, but said grating extended to within two and one-half or three inches of said oven.' Before the plaintiff can recover in this action, he must show that his injuries were traceable directly and proximately to the said negligence of the defendant. And if the plaintiff purposely or carelessly did any act which caused him to fall, or accidentally lost his balance and fell and that the falling was not produced by the existence of the alleged opening between the said grating and oven, then such opening is not the proximate cause of the injury and the plaintiff cannot recover in this action and your verdict should be for the defendant." In view of the theory of the defense that the injury was purely accidental, and not due to the aperture between the grating and the oven, it was error to refuse to give this instruction. This error is not cured by any other instruction given.

Objection is also made to the admission of certain evidence. We have given consideration to this question, but find no reversible error committed by the court in this respect. The ends of justice will be best subserved by granting a new trial. Judgment reversed with instructions to grant a new trial, and for other proceedings not inconsistent with this opinion.

NOTE.—Reported in 105 N. E. 167. As to risks assumed by servant before era of employer's acts, see 52 Am. Rep. 737. On the question of the master's statutory liability for defects in condition of plant, generally, see 57 L. R. A. 817. See, also, under (1) 26 Cyc. 1397, 1399; (2, 4) 26 Cyc. 1392; (3) 26 Cyc. 1392, 1397; (5) 8 Cyc. 1002; (6) 26 Cyc. 1386; (7) 26 Cyc. 1513; 38 Cyc. 1927; (8) 26 Cyc. 1491; (9) 38 Cyc. 1711; (10) 26 Cyc. 1496.

ELDER, ADMINISTRATOR, v. ERIE CANAL COAL COMPANY.

[No. 8,655. Filed October 14, 1915.]

1. MASTER AND SERVANT.—*Safe Place to Work.—Mines.—Statutes.*—"Or".—Under §8582 Burns 1914, Acts 1907 p. 334, making it unlawful to construct any entry or trackway, after the taking effect of the act, in any coal mine where drivers are required to drive with mine cars, without a space on both sides of at least two feet in width and free from props, loose slate, etc., only such entries as are excavated after the act became a law come within its provisions, since the use of the word "or" is consistent with the assumption that the word "trackway" is an explanatory expression of the idea expressed by the word "entry", which refers to an opening in the mine in which a track is to be laid, rather than to the track itself; hence the act does not apply to an entry constructed prior to the enactment in which there has been a subsequent reconstruction of the track. p. 603.
2. MASTER AND SERVANT.—*Safe Place to Work.—Mines.—Statutes.*—Where a driver operating a car in a coal mine is involved in a collision, wreck or other accident, produced by other causes than the failure of the mine operator to comply with §8582 Burns 1914, Acts 1907 p. 334, relating to the construction of entries, and such failure becomes the proximate cause of his injury by reason of his inability to escape from the car or track, the statute applies as well as in the case where the operator's failure to comply with the statute produces the collision, wreck or other accident as the proximate cause thereof resulting in the injury to the driver. p. 605.
3. MASTER AND SERVANT.—*Injuries to Servant.—Evidence.—Jury Question.*—Where the evidence in an action for the death of a driver of cars in a coal mine was such as to produce uncertainty as to whether the accident occurred at a point in an old entry not within the provisions of §8582 Burns 1914, Acts 1907 p. 334, relating to the construction of entries, or whether it occurred at a point in an extension of the entry made since the act became effective, the question was properly for the jury and the court erred in directing a verdict. p. 605.

From Gibson Circuit Court; *Lucius C. Embree*, Special Judge.

Action by Henry T. Elder, administrator of the estate of John Byers, deceased, against the Erie Canal Coal Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Elder v. Erie Canal Coal Co.—59 Ind. App. 598.

Tweedy & Youngblood, Ernest J. Crenshaw and Henry Kister, for appellant.

Albert W. Funkhouser, Arthur F. Funkhouser and Thomas Duncan, for appellee.

CALDWELL, J.—Appellant's decedent, on September 20, 1910, while driving a mule harnessed to a train of coal cars in appellee's mine in Warrick County, was killed by coming in contact with the cars. He left a widow and infant children surviving him. This action brought by appellant to recover damages in behalf of the widow and children, on account of the killing of decedent, is based on section 1 of the act of March 9, 1907, in force April 10, 1907. Acts 1907 p. 334, §8582 Burns 1914. The section is as follows: "That it shall be unlawful for any owner, lessee, agent or operator of any coal mine within the State of Indiana, to make, dig, construct, or cause to be made, dug or constructed any entry or trackway after the taking effect of this act, in any coal mine in the State of Indiana where drivers are required to drive with mine car or cars unless there shall be a space provided on one or both sides continuously of any track or tracks measured from the rail, in any such entry of at least two (2) feet in width, free from any props, loose slate, debris or other obstruction so that the driver may get away from the car or cars and track in event of collision, wreck or other accident. It shall be unlawful for any employe, person or persons to knowingly, purposely or maliciously place any obstruction within said space as herein provided: *Provided*, That the geological veins of coal numbers three and four commonly known as the lower and upper veins in the block coal fields of Indiana shall be exempt from the provisions of this act." The second section of the act provides a penalty for the violation of the provisions of the first section.

At the close of appellant's evidence in chief, the jury, in obedience to a peremptory instruction given by the court

to that end, returned a verdict in favor of appellee. The basic question presented by this appeal is whether the court erred in giving such peremptory instruction. This basic question as presented divides itself into two secondary questions: (1) Whether the evidence brings appellee's case within the provisions of the quoted act, so that such act is applicable. (2) Assuming the act to be applicable, whether the evidence makes such a case as should have been submitted to the jury for determination.

There was evidence in substance as follows: The mine consisted of a perpendicular shaft sunk from the surface of the ground to the coal vein being mined, which vein was neither of those excepted from the provisions of the statute. From the bottom of the shaft, passageways, known as mine entries, extended in various directions through the coal vein, with lateral entries branching off on either side. On each side of an entry, there was a solid wall of coal left, among other reasons, for purposes of support. The faces of these walls were known as ribs. Through these entries, car tracks extended concentrating at the bottom of the shaft, on which tracks coal was transported to the bottom of the shaft by means of cars drawn by mules, and there elevated to the surface. One of such main entries known as the main south entry extended from the bottom of the shaft southward. Prior to the passage of said act of 1907, this entry had been excavated from the bottom of the shaft southward several hundred feet to an opening into the east mine known as the old breakthrough. This portion of the entry was known as the old entry south. In July, 1907, after said act became a law, this entry was extended southward by an excavation that curved slightly to the west and then to the east following the coal vein up a three per cent grade to a place known as the top of the hill, at which cars loaded with coal were assembled for purposes of transportation to the bottom of the shaft. In May, 1908, after said act became a law, appellee removed, repaired and replaced

a considerable portion of the track in the main entry south, commencing at a point south of the bottom of the shaft near the second entry west, and from thence south to the end of the old entry, and thence southward through the extension to the top of the hill. In doing this work, the old track was removed, the road bed leveled, new crossties laid, and new iron and steel substituted in place of the old rails some of which were wooden and some metal. A witness designated the old track as a temporary or workout track. At one point also a corner of coal was chipped from the east rib, leaving the clearance at that point ten to twelve inches.

There was other evidence bearing more particularly on the second of said secondary questions, to the following effect: On the morning of September 20, 1910, appellant's decedent, employed by appellee as a driver, started from the top of the hill with a train of three cars, loaded with coal and drawn by a mule. The proper position for the driver is to stand with his right foot on the front bumper of the front car, the left foot on the tail chain, the right hand on the car, and the left hand on the mule's rump. The tail chain extends from the singletree to a hook attached to the bumper. It was decedent's custom to occupy such position while driving, but there was no evidence that he followed such custom on this occasion. A few minutes later his dead body was found at a point in the old part of the entry about thirty-five feet south of the second west entry. The head and shoulders were wedged between the front car and the east rib, the body extending onto the track, held in contact with the wheels of the front car. The body was nearly severed at the waist line, evidently by the wheels on the east rail having come in contact with it. There were other injuries including a slight wound or abrasion on the right side of the head near the forehead. The rear wheels of the front car and the front wheels of the second car were off the track to the west. The mule

with tail chain detached from the car was about thirty feet north. Decedent's cap was found on the east side of the track twenty to twenty-eight feet south of the body and 250 feet north from the top of the hill. The cap was slightly torn or cut, and there were hair and traces of blood on the inside of it. A few feet north of the cap there was a little blood two feet up on the east rib, and also at places between there and the body, and also on lumps of coal east of the track. Nearly opposite the body there was blood and a piece of flesh eight inches up on the east rib. There were indications east of the track and south of the body that it had been dragged a few feet.

The east rail was eleven inches from the rib at the body, eighteen inches at the cap and a wider clearance south. The west rail was six to eight feet from the rib at the body, with a line of props three feet from the rail. South fifty to sixty feet the west rail was within fourteen to sixteen inches of the rib. East of the track extending south from the body were scattered lumps of coal and some evidence that there was trash from the mine consisting of stone, clay, slate, etc., known as "gaub", the latter sloping up from the rail to a foot thick at the rib. On the west side from the body south about fifty feet, the gaub was eight inches deep at the rail, and sloped to three feet deep at the rib, and some evidence that in places the rail was covered with gaub and coal.

It seems to be clear under the evidence that the point where the body lay was within the old part of the entry. There was controversy, however, whether the point where the cap was found was within the old entry or within its extension. Appealing to the evidence, appellee contends for the former location, appellant the latter. To settle the controversy would require that we weigh the evidence and accept as true certain measurements and estimates to the exclusion of others. It is probable that much uncertainty might have been removed had certain plats referred to by

Elder v. Erie Canal Coal Co.—59 Ind. App. 598.

counsel and witnesses at the trial been introduced in evidence with a clear explanation thereof.

The parties do not agree on their interpretation of the act of 1907. Appellant argues that the transaction that gives vitality to the act in a given case within the

1. meaning of the words "after the taking effect of this act" is not only the excavating of an entry and the laying of a track therein, but also the mere laying or relaying of a track in an entry excavated before the act became a law; that if prior to the time when the act went into force, an entry had been excavated in the process of developing the mine and a track laid therein after the act became a law, or if at the time when the act took effect a track was being operated in an entry theretofore excavated, and such track was thereafter taken up and a new track laid, the act applies. Appellee, however, contends that the act extends only to entries excavated after it became a law. Appellant to sustain his contention argues that the term "trackway" as used in the act, has reference to the track as distinguished from the excavation on the bed of which the track is laid; while appellee argues that the terms "entry" and "trackway" are practically synonymous as used in the act. We are, therefore, required to construe the act. While this act has been interpreted by the Supreme Court to the extent necessary in upholding its constitutionality (see, *State v. Barrett* [1909], 172 Ind. 169, 87 N. E. 7, and *Barrett v. State* [1911], 175 Ind. 112, 93 N. E. 543), our search has failed to disclose that it has been construed in its relation to questions here involved, or that a construction has been placed on any similar act in a like relation by courts of other jurisdictions. In endeavoring to construe this statute, there are two matters to be kept in mind, each of which may be fairly gathered from the language employed by the lawmaking body, (1) that it was evidently within the legislative purpose to safeguard certain persons or classes of persons; and (2) that in so doing an

important industry of the State, in the successful prosecution of which not only the operators but also the public are interested, should not be unreasonably hampered. The first of these purposes is indicated somewhat by the language "so that the driver may get away from the car or cars and track in the event of a collision, wreck or other accident". We construe this language, however, as illustrative of the extent and nature of the clearance to be provided, rather than as limiting the class of persons to be afforded protection, or the circumstances under which they shall be safeguarded. We believe the legislative intent as gathered from the act to have been no narrower than that the clearance required by the act should afford a means of protection to drivers under all circumstances while properly operating cars within the kind of entry specified by the act.

As to the second proposition, the language "after the taking effect of this act" indicates what entries come within the provision of the law. We believe it to have been within the legislative mind that an entry excavated in the course and as a part of the plan of developing the mine has an element of permanency; that it is excavated somewhat with relation to other entries and the dividing walls of support. We are, therefore, of the opinion that only entries excavated after the act became a law come within its provisions. The use of the phrase "entry or trackway" does not necessarily argue against our conclusion. The word "or" is frequently used in a synonymous or explanatory sense; to connect two words which express the same idea. 29 Cyc. 1502; *Arthur v. Cumming* (1875), 91 U. S. 362, 23 L. Ed. 438. The use of the word "or" is therefore consistent with an assumption that the word "trackway" is an explanatory expression of the idea expressed by the word "entry"; that the reference is to an opening in a mine in which a track is to be laid; that it has reference to a place where a track is laid rather than to the track itself. This conclusion is

supported by the fact that in other connections in the act, the word "track" rather than "trackway" is used where the reference is to the structure designed for the passage of cars. Neither do we believe that the use of the words "make and construct" argues against our conclusion. While doubtless it is true that where the reference is to a material thing fabricated by human effort these words primarily mean the bringing together of the parts that compose an entire structure, yet among the many shades of meaning in which they are used are those broad enough to include the excavating and shaping of an entry.

It is evident from what we have said that only the extension of the old south entry being the entry from the old breakthrough to the top of the hill comes within the provisions of the act of 1907. That part of the entry was excavated after the act became a law.

Returning to a more specific consideration of the errors assigned, a driver operating a car in a mine may be involved in a collision, wreck or other accident, pro-

2. duced by other causes than the failure of the mine operator to comply with this statute, and thereupon such failure may become the proximate cause of his injury suffered by reason of his inability to escape from the car or track; or the failure of the operator to comply with the statute may produce the collision, wreck or other accident as the proximate cause thereof, resulting immediately in the injury of the driver; or the collision, wreck or other accident, having been so produced, the failure of the operator to comply with this statute may be the proximate cause of an injury suffered by the driver by reason of his inability to escape from the car or track. In either of such cases, in our judgment, the statute is applicable.

On the record, as it comes to us, there is, as we have indicated, uncertainty respecting the location of the

3. initial point of the accident, and whether such point was within the old entry or the extension thereof.

There was some evidence that might warrant an inference that such point was within such extension. There were also facts and circumstances in evidence possibly authorizing the conclusion that the accident was caused primarily by insufficient clearance being provided in such extension, and also that obstructions in such extension may have prevented the escape of the decedent. Much of the uncertainty grows out of conflicting evidence, estimates and measurements of distances. Under such circumstances, we are impressed as the record comes to us that the case should have been submitted to the jury under proper instructions. On a retrial much of the uncertainty may be removed and thereby the ends of justice clearly attained. The judgment is reversed with instructions to sustain the motion for a new trial.

NOTE.—Reported in 109 N. E. 805. As to duty of master to servant, see 75 Am. St. 591. "Or" in statute or ordinance, see Ann. Cas. 1913 A 1058. See, also, under (2) 26 Cyc. 1092; 29 Cyc. 496; (3) 26 Cyc. 1460.

METROPOLITAN LIFE INSURANCE COMPANY v.
STENGER.

[No. 8,653. Filed October 14, 1915.]

1. JUDGES.—*Special Judges. — Appointment.*—Under §§428-431 Burns 1914, Acts 1903 p. 343, relating to the appointment of special judges, and providing that if a special judge appointed by the regular judge fails to qualify and assume jurisdiction within twenty days, etc., the appointment shall be deemed vacated, and that if another is not appointed in five days, the clerk shall, on request of either party, certify the facts to the Governor, who shall make the appointment, and under §427 Burns 1914, Acts 1907 p. 108, providing for the selection of a special judge by the striking off of names submitted by the regular judge, where the judge appointed on change of venue from the regular judge appointed another on change from himself, and his appointee failed to qualify, the regular judge was without authority to make a further appointment. p. 607.
2. JUDGES.—*Special Judges.—Objections to Appointment.*—Where objection to the appointment of a special judge was made at the

Metropolitan Life Ins. Co. v. Stenger—59 Ind. App. 603.

time, and exception reserved, the party objecting was not required to object to him qualifying, or to his several acts during the trial, in order to take advantage of the irregularity on appeal. p. 609.

3. JUDGES.—*Special Judges.—Unauthorized Appointment.—Legality of Proceedings.*—The proceedings had before a special judge, whose appointment by the regular judge was without statutory authority and over the objections and exceptions properly made and reserved, are illegal. p. 609.

From Whitley Circuit Court; *Lemuel W. Royse*, Special Judge.

Action by Bertha V. Stenger against the Metropolitan Life Insurance Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Breen & Morris, for appellant.

W. A. Branyan, Wilbur E. Branyan, W. H. McNagny, Robert McNagny and Philip McNagny, for appellee.

IBACH, P. J.—This was an action brought by appellee to recover from appellant the amount of an insurance policy issued by it on the life of her husband, and in which she was named beneficiary.

At the threshold of this case we meet with a jurisdictional question, the determination of which makes it unnecessary to consider any of the further errors assigned

1. for reversal. Appellant insists that the regular judge of the Whitley Circuit Court erred in the appointment over its objection, of the special judge who tried the cause and therefore all the subsequent proceedings were irregular and illegal. The record discloses the following facts: On April 4, 1911, the venue of the cause was taken from the regular judge. On May 4, 1911, E. A. Bratton was appointed special judge. On November 9, 1911, a change of venue was taken from him, and on December 2, 1912, J. A. Brown of Angola was appointed. On February 5, 1913, an order was entered by the regular judge to the effect that as said Brown had failed to qualify and assume jurisdiction of the case the same was assigned to Lemuel

W. Royse, special judge. Appellant at the time of the appointment of said Royse objected and excepted and properly filed its special bill of exceptions.

Under the facts the regular judge exceeded his authority in making the appointment of Judge Royse. The law in effect at the time of these proceedings provides that in all actions in which a change of venue is taken from the regular judge, it shall be the duty of such judge within five days after such change is applied for to appoint a special judge to try the cause, and whenever a special judge so appointed fails to qualify and assume jurisdiction of the cause within twenty days after his appointment or fails to attend at any subsequent term of the court in which the cause is pending, thereupon the appointment of such special judge shall be held to have been vacated, and in the event another person is not appointed within five days by the regular judge, the clerk of the court where the action is pending shall forthwith, on request of either party, certify the facts to the Governor, who shall appoint another special judge who shall have jurisdiction of the cause. Acts 1903 p. 343, §§428-431 Burns 1914. Also the act of 1905 as amended in 1907 provides that whenever a change of venue is taken from the regular judge in any civil action or in any case where the presiding judge is disqualified to try the case for any cause, if the parties in open court do not agree upon some person to try the case it shall be the duty of the court within three days to nominate three competent and disinterested persons, each of whom shall be an available judge or member of the bar of this State, to be submitted to the parties in the action, from which the plaintiff side and defendant side, within two days thereafter, may strike off one of such names each; the court shall thereupon appoint the person or one of the persons who shall remain unchallenged to preside as judge in said action. Acts 1907 p. 108, §427 Burns 1914.

It is apparent that Judge Royse was not appointed as

Bledsoe v. Ross—59 Ind. App. 609.

provided for by law, and appellee does not seriously contend otherwise. Her position is that appellant can

2. not take advantage of such irregular appointment at this time, because it failed to object to Judge Royse qualifying, and to his several acts during the trial. This was not necessary, having objected and excepted to his appointment when made, it would be an idle ceremony on appellant's part to further object. Even if such further objections were made, that fact would not add to nor detract from the effect of what was actually done by appellant to secure its rights. *Lillie v. Trentman* (1891), 130 Ind. 16,

20, 21, 29 N. E. 405. We see no escape from holding

3. that, the appointment of Judge Royse as made having been unauthorized, and appellant having properly objected and excepted to the appointment, all the proceedings connected with the case after that time were illegal. Consequently the trial court committed error in making such appointment, and such error necessitates a reversal of the cause. Judgment reversed.

NOTE.—Reported in 109 N. E. 781. As to the validity of acts of *de facto* judge, see 12 Ann. Cas. 208. See, also, under (1) 23 Cyc. 608; (2) 23 Cyc. 616.

BLEDSON ET AL. v. ROSS ET AL.

[No. 8,552. Filed June 1, 1915. Rehearing denied October 14, 1915.]

1. RECORDS.—*Instrument Not Entitled to be Recorded.*—*Notice.*—Under §3965 Burns 1914, any conveyance or instrument in writing, to be entitled to be placed of record, must be acknowledged by the grantor, and if copied into the record without such acknowledgment, the record is not notice to any one without actual knowledge. p. 612.
2. VENDOR AND PURCHASER.—*Knowledge of Prior Contract.*—*Evidence.*—*Finding.*—*Conclusiveness.*—Where there was evidence that the purchasers of land had admitted that they had heard rumors of its purchase by plaintiffs, which was met by the testimony of such purchasers denying that they had actual knowledge,

Bledsoe v. Ross—59 Ind. App. 609.

the jury had a right to infer that they had no actual knowledge, notwithstanding it further appeared that such purchasers learned from their abstract that an unacknowledged contract of sale to plaintiffs had been entered in the records of the county, and the finding is conclusive. p. 612.

From Pulaski Circuit Court; *Francis J. Vurpillat*, Judge.

Action by Harry W. Bledsoe and another against David C. Ross and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed*.

Henry A. Steis and *John M. Spangler*, for appellants.

McConnell, Jenkines, Jenkines & Stuart and *Horner & Thompson*, for appellees.

IBACH, P. J.—Suit for specific performance of contract to convey real estate. The only error assigned is the overruling of appellants' motion for new trial. The principal grounds of the motion were that the verdict is not sustained by sufficient evidence, and is contrary to law. The sole question involved is whether appellees Charles H. and John Kruger are innocent purchasers for value of the real estate in controversy without notice of any prior equity in favor of appellants. Briefly, the evidence shows that appellee David C. Ross, a married man, residing in Illinois, about April 6, 1911, entered into a contract to convey to appellants seventy-eight acres of land in Pulaski County, Indiana, for \$7,800, and received \$500 cash on the contract. Appellee Mattie Ross, the wife of David C. Ross, did not sign the contract, neither was the contract acknowledged. On September 11, 1911, David C. Ross contracted to sell the same land to appellees Kruger for \$9,360. On September 12, the Krugers paid to Ross \$360 on the contract. On September 13, appellants had a copy of their contract of purchase placed on record in Pulaski County. On September 14, Ross wrote to appellants and stated that his wife, who had an interest in the land, had refused to sign a deed to them, and offered to return them their money. On September 21, 1911, the Krugers sent to the First

National Bank of Bloomington, Illinois, a draft payable to the order of Ross and a mortgage on the lands and two notes drawn in his favor, with instructions to deliver the draft, mortgage and notes to Ross on his delivery to the bank of a deed to them for the lands. On the same day, after the letter containing the draft and mortgage had been mailed, appellee Charles H. Kruger received a copy of an abstract of title which showed that appellants had of record a contract for the purchase of Ross's land, but he did not read it, and instead mailed it to his attorneys in Logansport, Indiana. About September 25, 1911, appellees David C. and Mattie Ross executed and delivered a deed conveying the lands to the Krugers, which the latter received the next day. On September 28, after having received the deed, appellees Krugers first obtained actual notice that the abstract which they had sent to their attorneys showed that appellants had a contract for the purchase of the lands. As to the above facts, the evidence is uncontradicted.

Some of appellants' evidence would tend to show that the Krugers had heard of the sale of the Ross lands to appellants before they made their purchase, but the Krugers testify that the day before contracting with Ross to buy the land, they met one of appellants on the street and asked who owned the Ross land, and were told that Charles Keipke had bought it, that they asked Keipke about it, and were told that Ross still owned it, and thereupon they at once went to see Ross and bought it. Ross did not mention appellants' contract to them, and testified that his reason for so doing was that he did not think it a binding contract in law. Appellees Krugers testified that they honestly believed that Ross was the owner of the land, and that they had no actual knowledge from any source of the existence of the former contract when their contract was made, and appellee Ross testified as to a conversation with appellees Krugers after the sale, in which they expressed surprise that there had been a former contract.

The first question is whether appellees Krugers, who before the consummation of the transfer of the lands to them,

had in their possession an abstract containing a copy

1. of appellants' contract, but did not actually learn of the contract until the sale was completed, can be said to have had constructive knowledge of it. To entitle any conveyance or instrument of writing to be recorded, it must be acknowledged by the grantor. §3965 Burns 1914, §2933 R. S. 1881. The contract of David C. Ross was not acknowledged, and was not entitled to record. Where an instrument not entitled to record has actually been copied on the record, such record is not notice to any one without actual knowledge. *Kothe v. Krag-Reynolds Co.* (1898), 20 Ind. App. 293, 308, 55 N. E. 94; *Watkins v. Brunt* (1876), 53 Ind. 208, 210; *Westhafer v. Patterson* (1889), 120 Ind. 459, 22 N. E. 414, 16 Am. St. 330.

So far as actual knowledge of the contract is concerned, the testimony of appellants that the Krugers admitted that they had heard rumors of appellants buying the land,

2. is overcome by the denial of the Krugers that they had actual knowledge. It seems that there are some courts which would hold that a jury might infer actual knowledge of the record from evidence such as that in this case. 2 Pomeroy, Eq. Jurisp. §600. But we have been unable to find any decisions, nor have any been cited by appellants, which would hold as a matter of law that actual knowledge must be inferred from facts such as are here presented. The jury had a right, under the evidence, to find that the Krugers had no actual knowledge of the contract of appellants, and such finding will not be disturbed on appeal.

The court did not err in overruling appellants' motion for new trial. Judgment affirmed.

NOTE.—Reported in 109 N. E. 53. As to defects in the registration of conveyances, see 91 Am. Dec. 106. See, also, under (1) 1 C. J. 756, 757; 1 Cyc. 518; 39 Cyc. 1733; (2) 39 Cyc. 1784.

CITY OF EAST CHICAGO v. GILBERT.

[No. 8,480. Filed March 3, 1915. Modified on rehearing June 28, 1915. Transfer denied October 14, 1915.]

1. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defective Sidewalks.—Complaint.—Sufficiency.*—A city owes to the public the duty to use reasonable care to keep its streets and sidewalks in a reasonably safe condition for the use of travelers; hence a complaint against a city for personal injuries caused by stepping into a hole in a sidewalk, alleging facts to show that defendant is a municipal corporation duly organized as a city, and that it negligently permitted the sidewalk to become and remain out of repair, is not open to the objection that it fails to show that the defect complained of resulted from the failure of the city to perform any duty incumbent upon it. p. 617.
2. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defective Sidewalks.—Knowledge.—Complaint.*—A complaint against a city for injuries received by reason of the defective condition of a sidewalk, alleging that for more than six months prior to the injury, the sidewalk had been defective in the particular alleged, and that defendant had full and complete knowledge and notice of said defective condition of said sidewalk for six months prior to the injury, is not open to the objection that it charges knowledge only of the defective condition of the walk, and not knowledge of the hole therein which caused plaintiff's fall, in view of the fact that the general averment of the defective condition is followed by a particular description thereof including an allegation of the existence of the hole. p. 618.
3. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defective Sidewalks.—Complaint.—Averments.—Construction.*—A complaint for personal injuries caused by stepping into a hole in a sidewalk, charging that defendant city negligently permitted the sidewalk to remain in such defective condition, without any light, barrier, etc., that a person travelling along the sidewalk was unable to see the hole, and that plaintiff was unable to and did not see it on account of the darkness, and "that plaintiff's injuries were caused solely by the carelessness and negligence of defendant above alleged", is not to be construed as predicated negligence upon the failure to light the street or to place lights in the vicinity of the defect, but as charging negligence with respect to the defective condition of the sidewalk, in connection with which the absence of light was an incident. p. 619.
4. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defects in Streets and Sidewalks.—Notice of Injury.—Statutes.*—Under §8062 Burns 1914, Acts 1907 p. 249, requiring the service of notice

of injury caused by the defective condition of a street or sidewalk, the service of a proper notice upon certain designated officers of the city within the time specified is essential in order that an action for the injury may be sustained. p. 619.

5. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defective Sidewalks.—Notice of Injury.—Sufficiency.*—A notice served on defendant city pursuant to §8962 Burns 1914, Acts 1907 p. 249, by plaintiff who was injured by stepping into a hole in a sidewalk, setting forth that the injury occurred while plaintiff was walking on the east side of a certain street, "In front of lot 29, block 18, * * * a subdivision known as number 3353-3355 Commonwealth Avenue", was sufficient although the evidence showed that the hole was in front of lot 27, in view of the fact that the house numbers 3353-3355 were set apart for lot 27 and a house thereon bore the number 3353, and that there was no such hole in front of lot 29. pp. 619, 620, 621.
6. MUNICIPAL CORPORATIONS.—*Defective Streets and Sidewalks.—Notice of Injury.—Variance.—Review.*—In determining whether there is such a variance as to the place of injury as to preclude the admission in evidence of the notice of injury served by plaintiff on defendant city pursuant to §8962 Burns 1914, Acts 1907 p. 249, requiring notice of injury from defective streets or sidewalks as a condition precedent to maintaining an action therefor, it is proper for the court to resort to the evidence, not for the purpose of supplementing the notice or supplying deficiencies therein, but rather to apply the notice to the situation as it appears on the ground. p. 620.
7. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defective Streets and Sidewalks.—Notice of Injury.—Statutes.*—Section 9862 Burns 1914, Acts 1907 p. 249, is mandatory, and makes the giving of the notice therein provided for a condition precedent to a right of action for personal injuries caused by the defective condition of a street or sidewalk, and, while it is to be strictly construed in so far as it concerns the giving of the notice within the time specified and to the proper officers, a liberal construction is applied when determining whether a notice given was sufficiently definite as to the time, place, nature, etc., of the injury. p. 621.
8. APPEAL.—*Review.—Questions Not Presented.*—When the record, in an action against a city to recover for personal injuries caused by the defective condition of a sidewalk, showed that no objection referring to the subject of the injuries was interposed to the reading in evidence of the notice of injury required by §8962 Burns 1914, Acts 1907 p. 249, but that after it was read, appellant moved to strike out all testimony that had been given respecting injuries not covered by the notice, and which had been heard without objection, and it further appeared that the overruling of

City of East Chicago v. Gilbert—59 Ind. App. 613.

such motion had not been assigned as error, and that no instruction had been requested excluding from the consideration of the jury in assessing damages the injuries claimed not to have been covered by the notice, the question of the sufficiency of such notice in its relation to the injury suffered was not presented for review. p. 624.

9. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Contributory Negligence.—Burden of Proof.*—In an action for personal injuries from the defective condition of a sidewalk, defendant city has the burden of proof on the question of contributory negligence. p. 626.
10. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defective Sidewalks.—Contributory Negligence.*—While a sidewalk may be so defective as to preclude recovery by one on the principle of incurred risk if it appears that with knowledge of its condition he ventured thereon and was injured, yet the mere fact that one goes upon a sidewalk with knowledge of a defect therein, and is injured thereby, does not necessarily prevent a recovery for such injury. p. 626.
11. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defective Sidewalks.—Contributory Negligence.—Jury Question.*—Where the evidence disclosed that plaintiff, who was injured by reason of a hole in a sidewalk, had some prior knowledge of the existence of such hole, and it further appeared that the hole was only about twenty-two inches long and four inches wide and was situated at one side of the walk which was six feet wide, the element of knowledge was merely for the consideration of the jury on the issue of incurred risk and contributory negligence; and the additional showing that plaintiff, having such previous knowledge forgot about the existence of such defect, did not conclusively show contributory negligence. pp. 626, 628.
12. MUNICIPAL CORPORATIONS.—*Personal Injuries.—Defective Sidewalks.—Contributory Negligence.—Knowledge of Defect.—Forgetfulness.*—Though a defect in a sidewalk may be so portentous of peril that a person attempting to use it would be chargeable with the responsibility of keeping it in mind or otherwise be found guilty of negligence contributing to an injury received in attempting to use the walk, a defect may be of such character that a momentary forgetfulness of its existence is excusable. p. 626.
13. MUNICIPAL CORPORATIONS.—*Defective Streets and Sidewalks.—Duty to Repair.—Rights and Duties of Traveler.*—The responsibility of keeping in mind a known defect or obstruction in a street or sidewalk does not rest upon the traveler with the same degree of intensity as upon the municipality, and, while it is the duty of the latter to make reasonable inspection, and to repair defects

and remove obstructions, so as to render the way reasonably safe for travel, the former, though bound to use ordinary care, need not make a close inspection, and may presume, in the absence of knowledge or means of knowledge to the contrary, that the municipality has performed such duty. p. 628.

14. *APPEAL.—Review.—Admission of Evidence.*—Appellant can not complain of the action of the trial court in permitting certain testimony to be given on reëxamination of a witness where it appears that the subject to which the testimony related was introduced by appellant on the cross-examination. p. 630.
15. *APPEAL.—Waiver of Error.—Briefs.*—Assignments in the motion for new trial respecting the admission and exclusion of evidence are waived by the failure of appellant's brief to contain any point directed to them. p. 630.
16. *APPEAL.—Review.—Instructions.*—There is no error in the giving or refusing of instructions where it appears from the record that the jury was fully and fairly instructed. p. 630.
17. *DAMAGES.—Excessive Verdict.—Review.*—Where plaintiff, a married woman fifty-six years of age, was injured by a fall, and it was shown that, though no bones were broken, she suffered severe pain in her right knee and leg and about her body in the region of the right kidney, that she was thereby confined to her bed for ten days and to the house for several months, under the regular care of a physician, that for about six months she was required to use crutches, that while the injury to the kidney did not materially interfere with the functions of the organ, it produced constant pain and a nervous condition, that the percentage of cures of such injuries is small, that the injury to the knee was probably permanent, and that she had lost weight and was unable to do all her housework, a verdict awarding her damages in the sum of \$6,000 was excessive. pp. 630, 631.
18. *APPEAL.—Review.—Excessive Damages.—Disposition of Cause.—Remittitur.*—While a determination on appeal that the damages are excessive affords ground for unconditional reversal, it does not necessitate such disposition of the cause, since, even though there is no definite standard for the measurement of the damages, the court may permit a remittitur of such amount as it may deem excessive and affirm the judgment on condition that such remittitur is made. p. 632.

From Lake Circuit Court; *W. C. McMahan*, Judge.

Action by Kate A. Gilbert against the City of East Chicago. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

City of East Chicago v. Gilbert—59 Ind. App. 613.

A. Ottenheimer and Lincoln V. Cravens, for appellant.
Gavit & Hall and W. B. Van Horne, for appellee.

CALDWELL, P. J.—Action by appellee to recover damages for personal injuries sustained in a fall alleged to have been caused by defects in a sidewalk in the city of East Chicago. Verdict and judgment for appellee in the sum of \$6,000.

The errors assigned and not waived are the insufficiency of the complaint, the ruling on the demurrer to the complaint, and the overruling of the motion for a new trial. Appellant argues that the complaint is insufficient by reason of the following: (1) that it does not appear from the averments that the defects in the sidewalk complained of resulted from the failure of the city to perform any duty incumbent on it; (2) that the complaint does not charge appellant with knowledge, actual or constructive, of the existence of such defect for a sufficient time prior to the injury that by reasonable diligence the city might have remedied it; and (3) that the proximate cause of the injury, as disclosed by the complaint, was the absence of light upon the street and in the vicinity of the defective conditions, and that the lighting of the streets is a governmental function, upon a failure to perform which actionable negligence can not be predicated.

As to the first objection, the complaint discloses that appellant is a municipal corporation, duly organized as a city.

Such being the case, it owed to the public the duty

1. to use reasonable care to keep the streets and sidewalks as a part thereof included within its limits in a reasonably safe condition for the use of travelers. It sufficiently appears from the complaint that appellant failed to perform such duty, in that it negligently permitted a certain public sidewalk in said city, extending along a certain public street therein to become and remain out of repair. The complaint is, therefore, not open to the first

objection. *Turner v. City of Indianapolis* (1884), 96 Ind. 51; *Touhey v. City of Decatur* (1911), 175 Ind. 98, 93 N. E. 540, 32 L. R. A. (N. S.) 350; *City of Evansville v. Behme* (1912), 49 Ind. App. 448, 97 N. E. 565; *Dooley v. Town of Sullivan* (1887), 112 Ind. 451, 14 N. E. 566, 2 Am. St. 209.

On the subject of the second objection, the allegations of the complaint are as follows: "That for more than six months immediately prior to the time plaintiff re-

2. ceived her said injury, and continuing until said injuries were received, the said sidewalk had been defective, dangerous and out of repair at the point where plaintiff received her said injuries, in this: That the planks constituting the same were rotten, defective and broken, and at said time a hole had existed in said sidewalk sufficient in size to admit of a person's foot going through the same." It is averred that appellee had no knowledge of such defective condition and that "defendant had full and complete knowledge and notice of said defective condition of said sidewalk for six months prior to said injury." There are other averments to the effect that said sidewalk consisted of wooden stringers laid lengthwise and of boards placed crosswise thereon, and that such boards were about six inches from the ground; that appellee while proceeding carefully along said sidewalk stepped into said hole and was thereby thrown to the walk and injured as alleged. Appellant's argument is that it is averred that appellant had knowledge of "said defective condition" but there is no averment that it had knowledge of the existence of the hole. We can not adopt appellant's construction of the complaint. In the quoted portion of the complaint, there is a general allegation of the defective condition of the sidewalk, followed by a particular description thereof. Included in the enumeration of the particulars is an allegation of the existence of a hole in the sidewalk. We think it apparent that the allegation of appellant's knowledge relates to such general description as so particularized. *Town*

of *Elkhart v. Ritter* (1879), 66 Ind. 136; *Turner v. City of Indianapolis*, *supra*; *City of Fort Wayne v. DeWitt* (1874), 47 Ind. 391; *City of Huntington v. Lusch* (1904), 33 Ind. App. 476, 480, 70 N. E. 402; *City of Linton v. Smith* (1903), 31 Ind. App. 546, 68 N. E. 617; *City of Valparaiso v. Chester* (1911), 176 Ind. 636, 96 N. E. 765; 28 Cyc. 1469, 1470.

As to the third objection, the complaint alleges that appellant carelessly and negligently permitted the sidewalk to remain in said defective condition, without any

3. light, barrier, etc., and that a person traveling along the sidewalk was unable to see the hole, etc., and that appellee was unable to see it, and did not see it, on account of the darkness. And "that plaintiff's said injuries were caused solely by the carelessness and negligence of defendant above alleged". We do not construe the complaint as predicated negligence upon the failure to light the street or to place lights in the vicinity of the defect in the sidewalk. The negligence is respecting the condition of the sidewalk; the absence of light is an incident. It is possible for the surrounding conditions to be such as to render an act or omission negligence, when in the midst of different surroundings, it might be otherwise. "If an obstruction exists that creates an actionable nuisance, the presence of lights might render that nuisance nonactionable by disclosing it." *Shreve v. City of Fort Wayne* (1911), 176 Ind. 347, 350, 352, 96 N. E. 7. See, also, *City of Evansville v. Pifer* (1912), 51 Ind. App. 646, 100 N. E. 110. The complaint is sufficient.

In order that a claim, such as is involved here, may be sustained by suit, the statute requires that a notice in writing "containing a brief general description of

4. the time, place, cause and nature" of the injury be served on certain designated officers within a specified time. §8962 Burns 1914, Acts 1907 p. 249. The question of the sufficiency and accuracy of the notice,

as descriptive of the place where appellee in fact received her injury, is properly presented. As related to such element, the notice is as follows: "While walking on the wooden sidewalk on Commonwealth Ave. between Michigan Ave. and Washington St., on the northeast side of said street immediately in front of lot 29, block 18, Indiana Harbor, Indiana, a subdivision known as number 3353-3355 Commonwealth Ave., in the city of East Chicago, Lake County, Indiana, I stepped into a hole in said sidewalk * * * and was thrown * * * and fell on my right side and was injured on my right side and limb, spraining my right hip," etc. It is not

contended that such notice is defective or in-

6. sufficient on its face, but that measured by the real place where appellee fell, as shown by the evidence, it constitutes such a wide variance as that it was error to admit it in evidence. In determining whether there is such a variance, it is proper to resort to the evidence, not for the purpose of supplementing the notice or to supply deficiencies therein, but rather to apply the notice to the situation as it appears on the ground. *Carson v. City of Hastings* (1908), 81 Neb. 681, 116 N. W. 673; *Benson v. City of Madison* (1898), 101 Wis. 312, 77 N. W. 161; *Buchmeier v. City of Davenport* (1908), 138 Iowa 623, 116 N. W. 695.

The evidence shows that Commonwealth Avenue extends southeastward from Michigan Avenue one block to Washington Street, and that the building lots along the

5. northeast side of Commonwealth Avenue are numbered from 17 to 29 inclusive, and consecutively from Michigan Avenue to said street. The lots are 50 feet wide. The place where appellee was hurt was in front of lot 27, and about 15 feet north of the north line of lot 28, and consequently about 65 feet from lot 29 described in the notice. There was a dwelling house on each of said lots, which houses bore street numbers as indicated by number

plates. On the northeast side of the street odd numbers were used, and two of such house numbers were set apart for each of such lots, so that lot 26 was numbered 3349; lot 27, 3353; lot 28, 3357 and lot 29, 3361. Under this system, there was no house numbered 3355. It will be observed that the notice described the place of injury with sufficient accuracy, if we look only to the house numbers, since such notice is to the effect that the place was in front of number 3353 Commonwealth Avenue. The sidewalk in front of lot 27 and also north of lot 25 was in bad condition. South of lot 27, it was in a better condition. In front of lot 27, the walk was uneven, by reason of boards that were settled and warped. Under the evidence, it is doubtful whether there was more than one hole in the sidewalk in front of lot 27. This was the hole in which appellee stepped. It was about three inches wide at the wide end, and about twenty-two inches long. If there was more than one hole at that point, this one in particular had attracted the attention of persons using the walk. In view of the fact that the notice stated that the accident happened in front of lot 29, taken with the other statements contained in the notice, and considering the physical surroundings, as shown by the evidence, was this notice effective? The provisions of said statute are mandatory, and the giving

7. of notice is a condition precedent to a right of action. *Touhey v. City of Decatur, supra*. In so far as concerns the requirement that the notice be given, and

5. within the time specified, and to the proper officers, the statute is strictly construed. *Touhey v. City of Decatur, supra*; *Peoples v. City of Valparaiso* (1912), 178 Ind. 673, 100 N. E. 70; *City of Rushville v. Morrow* (1913), 54 Ind. App. 538, 101 N. E. 659. But on the question of whether a notice in fact given is sufficiently definite as to the time, place, nature, etc., of the injury, the rule of liberal construction is generally adopted by the courts. *Pearll v. City of Bay City* (1913), 174 Mich. 643, 140 N.

W. 938; *Hammock v. City of Tacoma* (1905), 40 Wash. 539, 82 Pac. 893; *Judd v. City of New Britain* (1908), 81 Conn. 300, 70 Atl. 1028; *Hase v. City of Seattle* (1908), 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938. The purpose of such statute is "to apprise the officers of municipality of the location, so that it might be examined with a view to preparing a defense to the action if it was thought a defense should be made; that if it directs the attention of said officers with reasonable certainty to the place of the accident, the requirements of the notice have been met; and that it was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by meritorious claimants." *Hase v. City of Seattle, supra*. See, also, *Denver v. Perkins* (1911), 50 Colo. 159, 114 Pac. 484; *Pearll v. City of Bay City, supra*; *Johnson v. City of Fargo* (1906), 15 N. Dak. 525, 108 N. W. 243; *McComb v. City of Chicago* (1914), 263 Ill. 510, 105 N. E. 294. "If the statement so designates the place that the officers of the town, being men of common understanding and intelligence, can, by the exercise of reasonable diligence and without other information from the plaintiff, find the exact place where it is claimed the damage was received, it is in this respect sufficient because it fully answers the purpose of the statute." *Carr v. Ashland* (1883), 62 N. H. 665, 669. See, also, *McComb v. City of Chicago, supra*; *Denver v. Perkins, supra*. On the foregoing proposition, see also extensive note to *Sollenbarger v. Lineville* (1909), 18 Ann. Cas. 991.

An examination of the decisions cited above will disclose, as stated in *City of Fort Wayne v. Bender* (1914), 57 Ind. App. 689, 105 N. E. 949, that, as a rule, the statutes of other states requiring that such a notice be given, "provide in substance that the notice shall state the time, the place and cause of injury, without any qualifying words, while the statute of this State provides for the giving of a written notice containing a 'brief general description of

the time, place, cause and nature of such injury' ". Doubtless the nature of the obstruction or defect that caused the injury if described in the notice or some physical object referred to therein, may be sufficiently potent to render an otherwise ambiguous or indefinite notice reasonably certain: Thus, if the obstruction or defect is plainly visible, and there are no others of a like nature within the limits; or if reference is made to a well known building, tree or other physical monument, and if the place of injury is located with reference thereto. Here, if the city officers, on receiving the notice, had started on a tour of investigation, actuated by a good-faith purpose to locate the place where the injury was received, and guided only by such notice, they naturally would have proceeded to the sidewalk in front of lot number 29. Here they would have discovered no such hole in the sidewalk, as is described in the notice. Had they then exercised ordinary diligence, they would have observed that the notice located the place of injury with reference to a certain house number, and that the house number of lot 29 did not correspond with that in the notice. Such a spirit of diligence would then have prompted them to proceed to number 3353, and having obeyed such prompting, they would have discovered, sixty-five feet beyond lot 29, and in front of the lot that bore 3353 as a house number, the hole in the sidewalk, which was sufficient in its dimensions to attract the attention of persons using such sidewalk as dangerous.

We would not be understood as holding it to be important that the city officials had or could have had extraneous information respecting the place of accident. On the contrary, we do hold that the notice itself, unaided and unsupplemented by such outside information must be sufficient and sufficiently accurate to that end. *Touhey v. City of Decatur, supra*. It is, therefore, unimportant whether the city officials from any such extraneous source in fact did know the exact place of the accident. The inquiry is

whether the notice itself contained information or means of information which, when interpreted in the light of the physical surroundings, was sufficient to locate the place with reasonable accuracy. With these principles in mind, we hold that the notice sufficiently described the place where the evidence showed the accident happened, and that there was no material variance between it and the evidence in that respect, and that the court did not err in admitting the notice in evidence. See the following: *O'Brien v. City of St. Paul* (1911), 116 Minn. 249, 133 N. W. 981, Ann. Cas. 1913 A 668; *Wilson v. City of St. Joseph* (1909), 139 Mo. App. 557, 123 S. W. 504; *Ballew v. City of St. Joseph* (1912), 163 Mo. App. 297, 146 S. W. 454; *City of Lincoln v. Pirner* (1900), 59 Neb. 634, 81 N. W. 846; *Pearll v. City of Bay City*, *supra*; *Hammock v. City of Tacoma*, *supra*; *Johnson v. City of Fargo*, *supra*; *Comstock v. Village of Schuylerville* (1910), 139 App. Div. 378, 124 N. Y. Sup. 92; *McComb v. City of Chicago*, *supra*; *Buchmeier v. City of Davenport*, *supra*; *Wheeler v. City of Detroit* (1901), 127 Mich. 329, 86 N. W. 822; *City of Pueblo v. Babbitt* (1910), 47 Colo. 596, 108 Pac. 175; *Cloughessey v. Waterbury* (1883), 51 Conn. 405, 50 Am. Rep. 38. See also cases collected in note to *Sollenbarger v. Lineville*, *supra*, and note to *Elam v. City of Mt. Sterling* (1909), 20 L. R. A. (N. S.) 512, 758.

The insufficiency of the notice in its relation to the injury suffered is argued. It is not contended that the notice does not sufficiently describe certain injuries, but rather

8. that its contents are not broad enough to include all the injuries received by appellee, as shown by the evidence. The record is as follows: the objection interposed to the reading of the notice in evidence contains no reference to the subject of the injuries. After the notice was read in evidence, appellant moved to strike out all the testimony theretofore given respecting what appellant characterizes as the injuries not covered by the notice, and which

testimony was heard without objection. The court's action in overruling such motion is not assigned as error in the motion for a new trial. Appellant offered no instruction excluding from the consideration of the jury in assessing damages the injuries which appellant claims are not included among those described in the notice. The question, therefore, is not presented.

Appellant contends that the evidence shows affirmatively that appellee was guilty of contributory negligence. Briefly the facts are as follows: Appellee had lived for six years on lot 25, being near the *locus in quo*, during the last three to six months of which the hole was in the sidewalk. She testified that she had used the sidewalk frequently, and was familiar with it, and that she presumed she could have seen the hole had she looked, but that as she walked along, she was not looking at the ground, and that she was not thinking of whether there was a hole in the walk; that she knew there were holes in the walk west, but had no knowledge that there were holes in the walk east of her house; that it was about dusk when she stepped into the hole and that trees cast a shadow over the place; that a kitten was following her; that a dog which habitually chased cats approached from the rear; that fearing for the safety of the kitten, she was watching it and the approaching dog, and finally in turning with the intention of going back home, she stepped into the hole, twisted around and fell with her foot fastened. Appellee's examination taken before the trial was read in evidence. A part of it as set out in appellant's brief, is as follows: "Q. You knew there were several holes in the sidewalk along that location? A. Well, I suppose so, I don't remember. Q. * * * You knew there was an imperfect walk; that there were holes there? A. Yes, I suppose so. Q. * * * How long do you think you knew that there was more than one hole in that walk, and that there were holes both east and west of your house in

that sidewalk? A. Well, I can't remember, and I don't know. Q. Would you say it was a year? A. Well, it might be a year. Q. * * * And might have been six months? A. Might have been six months. Q. * * * You knew that that was not a perfect walk; you knew there were holes in that walk? A. I never gave it a thought; I don't know; I cannot say that I knew it. Q. But as you remember it now there were? A. I suppose so, there must have been."

Appellant's argument is that the evidence shows that appellee had prior knowledge of the existence of the hole in the walk; that she was inattentive, and as a consequence,

9. stepped into the hole and was injured, and that, therefore, her own negligence was the proximate cause of such injuries. On the issue of contributory negligence the burden of proof was on appellant. §362 Burns 1914, Acts 1899 p. 58. If appellee knew of the defective condition of the sidewalk, and with such knowledge, attempted to use it, she was not thereby necessarily precluded from a recovery. A sidewalk might be so defective as to suggest at once to a person of ordinary prudence that it could not be used without peril to life or limb, and regardless of the care exercised. In such case, the application of the principle of incurred risk would prevent a recovery of damages for injuries suffered by a responsible person in attempting to use it. Here, however, the hole was only about twenty-two inches
11. long and four inches wide, and was situated at the east end of a board about six feet long which measured the width of the sidewalk. In such case the
12. element of knowledge was merely for the consideration of the jury on the issue of incurred risk and contributory negligence. See, *Murphy v. City of Indianapolis* (1882), 83 Ind. 76; *City of Elkhart v. Witman* (1890) 122 Ind. 538, 23 N. E. 796; *Town of Boswell v. Wakley* (1897), 149 Ind. 64, 48 N. E. 637; *City of Frank-*

fort v. Coleman (1898), 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. 412; *Indiana, etc., Oil Co. v. O'Brien* (1903), 160 Ind. 266, 65 N. E. 918, 66 N. E. 742. But it is argued that the evidence shows such previous knowledge, and that appellee used no care to avoid the obstruction in the sidewalk, and that her forgetfulness, under the impulse of the distracting cause, as shown by the evidence, is not sufficient to acquit her of contributory negligence. Remembrance and diverting influences are not at all times subject to or controlled by the human will. Memory of a situation is related to the primary impression made from observing it. A defect in a sidewalk might be so portentous of peril that a person in attempting to use it would be chargeable with the responsibility of keeping it in mind or otherwise be found guilty of negligence contributing to any injury received in attempting to use the walk; or such defect might be of such a nature that momentary forgetfulness, especially when the attention is diverted, would be excusable. "The appellant was not bound at all times, by day and by night, to keep in mind the fact that some person had placed an obstruction in the way. The human mind is not so constituted that it can recall at all times things with which it is familiar, and we know from experience and observation that reasonably prudent persons receive injuries from defects and obstructions in streets and highways of the existence of which they had previous knowledge. The law does not, therefore, in all cases hold a person injured by a defect in a highway guilty of contributory negligence merely because he had previous knowledge of the defect, but generally treats the matter of knowledge as a fact or circumstance bearing on the question of contributory negligence to be submitted to the jury along with the other facts and circumstances surrounding the accident, leaving it for them to say whether, under the facts shown, the injured person was or was not guilty of contributory negligence." *Blankenship v. King County* (1912), 68 Wash. 84, 122 Pac. 616,

40 L. R. A. (N. S.) 182. Where a traveler "is injured as a consequence of a defect of which he had previous knowledge, the mere fact of previous knowledge does not *per se* establish contributory negligence. And this is also the rule where previous knowledge is coupled with absence of thought concerning the defect at the time of the injury, or a momentary forgetfulness of it. Previous knowledge of a defect and forgetfulness of it are important facts to be considered in connection with all other circumstances in determining whether the party injured was exercising reasonable care. But it is not negligence, as matter of law, for a person who has knowledge of a defect not to remember it at all times and under all circumstances." *Pyke v. City of Jamestown* (1906), 15 N. Dak. 157, 107 N. W. 359. See, also, *Jackson v. City of Grand Forks* (1913), 24 N. Dak. 601, 140 N. W. 718, 45 L. R. A. (N. S.) 75, and cases cited.

The responsibility of keeping in mind a known defect or obstruction in a street or sidewalk does not rest on the traveler with the same degree of intensity as on

13. the municipality. It is the duty of the latter to make reasonable inspection, and also to repair defects and remove obstructions known to exist or which
11. may be ascertained by the exercise of reasonable care, that the way may be rendered reasonably safe for travel. *City of Evansville v. Frazier* (1900), 24 Ind. App. 628, 632, 56 N. E. 729; *City of Evansville v. Wilter* (1882), 86 Ind. 414, 420. The former, however, has a right to presume, in the absence of knowledge or means of knowledge to the contrary, that the municipality has performed its duty in these respects, and while the traveler is chargeable with the duty of exercising reasonable care, he is not required to make a close inspection to discover whether such duty on the part of the municipality has been performed. It would, therefore, seem to follow that a defect in a street or sidewalk might be of such a nature that a

traveler, with prior knowledge of its existence, might momentarily forget there was such a defect without being chargeable with a want of due care, while the municipality, by reason of such duty resting on it, and a negligent failure to perform the same, might be held liable for an injury resulting therefrom. *City of Indianapolis v. Slider* (1914), 56 Ind. App. 230, 105 N. E. 56; *City of Bluffton v. McAfee* (1899), 23 Ind. App. 112, 53 N. E. 1058; *City of Valparaiso v. Schwerdt* (1907), 40 Ind. App. 608, 82 N. E. 923. For the force and effect of a diverting cause and its bearing on the issue of contributory negligence, see note to *Lerner v. Philadelphia* (1908), 21 L. R. A. (N. S.) 614, 648, 651. Note to *Knoxville v. Cain* (1913), 48 L. R. A. (N. S.) 628, 637. See, also, *City of Valparaiso v. Schwerdt, supra*.

Here the jury in answer to interrogatories found that appellee had no previous knowledge of the existence of the hole in the sidewalk. It is argued, however, that such answers are not sustained by the evidence. In our judgment the question of whether appellee had such knowledge was, in consideration of the state of the evidence, for the determination of the jury. As indicated, the jury found in appellee's favor on that proposition. But assuming that under the evidence the jury should have found otherwise respecting appellee's knowledge, the particular finding complained of is not controlling. *Sievers v. Peters, etc., Lumber Co.* (1898), 151 Ind. 642, 656, 50 N. E. 877, 52 N. E. 399; *Frank Bird Transfer Co. v. Krug* (1903), 30 Ind. App. 602, 613, 65 N. E. 309. Considering the nature of the obstruction, the at least partial darkness, the fact that appellee did not have in mind whether the sidewalk was defective, the temporary diversion of her attention, together with her prior knowledge or ignorance, as the case may be, of the defective condition of the walk, and in our judgment, the question of her contributory negligence was, under decisions hereinbefore cited, one of fact for the jury, under proper

instructions from the court, and the finding of the jury by the general verdict being in favor of appellee on that issue, is binding on this court.

It is urged that the court erred in permitting appellee to show on the reëxamination of a witness that there were trees along the sidewalk which cast a shadow over

14. the place where appellee received her injury. Appellant is not in a position to complain of such action of the court, for the reason that appellant introduced such subject on the cross-examination of the witness. Moreover, the evidence was proper as descriptive of the surroundings.

Other assignments in the motion for a new trial

15. respecting the admitting and excluding of testimony are waived as no point is directed to them in appellant's brief.

Complaint is made of instruction No. 9, to the effect that the burden of proving contributory negligence was on defendant. There was no error in this instruction.

16. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 103 N. E. 652; *Newcastle Bridge Co. v. Doty* (1907), 168 Ind. 259, 266, 268, 79 N. E. 485; *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489, 495, 73 N. E. 996. Our attention is directed to certain other instructions given and refused, but in our judgment, the jury was fully and fairly instructed.

Appellant contends that the damages assessed are excessive. The facts as shown by the medical and other evidence are as follows: At the time of receiving said injuries,

17. appellee was a married woman about fifty-six years old, and was living with her husband. She caught her foot in the hole in the sidewalk in such manner as that it remained fastened as she twisted around, and fell. No bones were broken or dislocated. The immediate effect of the injury was severe pain in the right knee and also in the right leg and side of the body and in the region of the right kidney. She was confined to her bed for about ten

days and to the house for several months, during all of which time she was under the regular care of a physician, and after which for about six months, she was compelled to use crutches. At the time of the trial, her injuries still required the attention of a physician from time to time. Appellee's most serious injury was a tearing of the right kidney loose from the connective tissue that binds it to the muscles of the back, and causing it thereby to hang suspended in the cavity of the body, which condition is popularly called a floating kidney. Such an injury does not materially interfere with the functions of the organ, but it produces constant pain and a nervous condition. A surgical operation of a serious nature might result in a cure of such an injury. The percentage of cures, however, is small. Temporary relief may be had by wearing a supporting bandage around the body; this also results in cures in about five per cent of the cases where tried. There was still some stiffness and a swollen condition of the right knee producing lameness at the time of the trial, eighteen months after the injury. There continued to be some pain in the right knee and leg. The condition of the knee is probably permanent. Prior to the injury, appellee's weight was about 98 pounds and although somewhat frail, her health was good, and she was able to do her own housework, including washing, ironing and baking. Since the injury her weight is from 85 to 88 pounds and she can do only light housework, not including washing, ironing or any work of that nature. The damages assessed are liberal, but under the rule that governs in such cases, we cannot say that they are excessive. Judgment affirmed.

ON PETITION FOR REHEARING.

CALDWELL, J.—Appellant has filed a petition for a rehearing urging among other things that the damages
17. assessed by the jury are excessive. This point was duly presented by appellant in its original brief, and

was considered by the court. As a result of a careful reëxamination of the case, we have concluded that the damages assessed are excessive within the spirit of the rule that governs in such cases in this court. It follows that the petition for a rehearing should be granted. In our judgment, however, while such a conclusion affords a

18. basis for an unconditional reversal, it does not necessitate such a disposition of the appeal. It has long been the practice, where the recovery is found to be excessive, in cases presenting a definite standard by which the proper amount may be estimated with reasonable accuracy, for trial courts and courts of appellate jurisdiction to permit the prevailing party to remit with a new trial or a reversal as the alternative. *Fairbanks v. Warrum* (1914), 56 Ind. App. 337, 104 N. E. 983, and authorities cited. Moreover, in cases such as this, where there is no definite standard by which to measure the damages and the trial court in considering a motion for a new trial, which contains an assignment of excessive damages as grounds, finds such assignment to be true, it has become an established rule that the trial court may permit the successful party to remit the excess or grant a new trial if he fails to elect to do so. *Tucker v. Hyatt* (1898), 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129; *Cleveland, etc., R. Co. v. Beckett* (1895), 11 Ind. App. 547, 39 N. E. 429; *Evansville, etc., Traction Co. v. Broermann* (1907), 40 Ind. App. 47, 80 N. E. 972. That a like rule prevails in a number of jurisdictions, see note to *Tunnel Mining, etc., Co. v. Cooper* (1911), 39 L. R. A. (N. S.) 1064.

The action of a trial court in passing on a motion for a new trial containing an assignment of excessive damages is reviewable by the courts of appellate jurisdiction in this State, and such courts are authorized to reverse and direct a new trial in a proper case where the damages assessed are found on appeal to be excessive. As a practical proposition, the power to determine that damages assessed are

excessive carries with it necessarily the implied power to determine what amount of damages would not be excessive. That is, the rule that trial courts may permit the prevailing party to remit down to a certain amount, and thereupon place the stamp of its approval on such amount as not being an excessive recovery, can be sustained only on the theory that trial courts may determine not only that a certain recovery is excessive, but also that a certain amount less than such recovery is not excessive. It follows that if courts of appellate jurisdiction in reviewing the action of the trial courts may determine that a certain recovery, although approved by the trial court, is in fact excessive, such courts may also determine what amount is not excessive. In order to determine that a certain amount is excessive, it is necessary to measure it by a certain other amount first determined not to be excessive. That courts of appeal in many jurisdictions do direct conditional remittiturs in cases such as this see *Burdick v. Missouri Pac. R. Co.* (1894), 123 Mo. 221, 27 S. W. 453, 45 Am. St. 528, 26 L. R. S. 384, and note; 4 L. R. A. Extra Ann. 67; *Chitty v. St. Louis, etc., R. Co.* (1899), 148 Mo. 64, 49 S. W. 868; *Chitty v. St. Louis, etc., R. Co.* (1902), 166 Mo. 435, 65 S. W. 959; *Arkansas, etc., Cattle Co. v. Mann* (1889), 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854.

Except as to the element of an excessive recovery, there is no error in the record for which there should be a reversal. Under the circumstances, it is our judgment that the ends of justice will be attained by permitting appellee to remit. The petition is therefore granted, and the mandate modified to the effect that it is ordered that if within twenty days appellee shall file in this court a remittitur in the sum of \$1,500, to be effective as of the date of the judgment below, the judgment will be affirmed for the residue in the sum of \$4,500; otherwise, the judgment will be reversed with instructions to the trial court to sustain the motion for a new trial; costs in either case against appellee.

Forsyth v. American Maize Products Co.—59 Ind. App. 634.

NOTE.—Reported in 108 N. E. 29; 109 N. E. 404. Remittitur when excessive verdict is granted through passion or prejudice, see 3 Ann. Cas. 939; Ann. Cas. 1912 C 509. See, also, under (1) 28 Cyc. 1358, 1465; (4) 28 Cyc. 1447; (5) 28 Cyc. 1455; (6) 28 Cyc. 1476; (7) 28 Cyc. 1450, 1462; (8) 3 C. J. 808, 1336; 2 Cyc. 693, 983; (9) 28 Cyc. 1478; (10) 28 Cyc. 1422; (11) 28 Cyc. 1512; (12) 28 Cyc. 1425; (13) 28 Cyc. 1427; (14) 3 Cyc. 245; (15) 3 Cyc. 388; (16) 38 Cyc. 1809; (17) 13 Cyc. 126; (18) 3 Cyc. 435.

FORSYTH ET AL. v. AMERICAN MAIZE PRODUCTS COMPANY ET AL.

No. 8,419. Filed April 16, 1915. Rehearing denied June 24, 1915.
Transfer denied October 14, 1915.]

1. **PARTIES.—Intervention.**—Where one, not a necessary party under the statute, seeks to intervene, the trial court may exercise its discretion and unless there is a clear abuse of such discretion no error is committed in denying the right to intervene. p. 637.
2. **PARTIES.—Intervention.—Diligence.**—An intervener must be diligent, and any unreasonable delay after knowledge of the suit will justify the court in refusing to allow the intervention, if he is not a necessary party to a full and complete adjudication of the rights involved, and has shown no satisfactory excuse for the delay. p. 637.
3. **EASEMENTS.—Action.—Parties.—Deeds.—Construction.**—Where an intervener's rights in a harbor and plaintiff's easement for a pipe line therein all rest in a grant by deeds from the owners of the adjoining real estate, the court, in passing upon the question of whether intervener is a necessary party, must consider all the deeds for the purpose of determining the rights of the parties and ascertaining whether they convey inconsistent privileges, or whether the several rights granted may coexist without any necessary conflict. p. 638.
4. **EASEMENTS.—Action.—Parties.—Privilege to Dredge Harbor.—Easement to Extend Pipe Line.—Intervention.**—Where plaintiff sued to enjoin an interference with its right to extend a pipe line which it maintained under the bed of a harbor, and it appeared that dredging privileges belonging to one seeking to intervene imposed no obligation, except in relation to the preservation and protection of the harbor in the event the work was undertaken, and that in the event such dredging were undertaken that the pipe line could be lowered so as not to interfere, that neither the public nor the intervener's privileges were affected by the pres-

Forsyth v. American Maize Products Co.—59 Ind. App. 634.

ence of the pipes, there was no necessary conflict between plaintiff's easement and intervener's privileges, and, in the absence of anything to show that intervener's rights could in any way be affected by the decree, the petition to intervene was properly denied. p. 638.

5. APPEAL.—*Review.—Harmless Error.—Striking Out Petition of Intervener.*—Error, if any, in striking out a petition to intervene, was harmless, where it appeared that petitioner was not a necessary party and had no absolute right to intervene. p. 639.

From Lake Superior Court; *Charles W. Hanley*, Special Judge.

Action by the American Maize Products Company against Charles B. Shedd and others, in which Oliver O. Forsyth and others filed petition to intervene. From a judgment denying the right to intervene, petitioners appeal. *Affirmed.*

John H. Gillett, for appellants.

Peter Crumpacker, Fred C. Crumpacker and C. B. Tinkham, for appellees.

FELT, J.—This is an appeal from a judgment denying appellants the right to intervene in the suit of American Maize Products Company against Charles B. Shedd, *et al.*, in the Lake Superior Court. The defendants in that suit are appellants in *Shedd v. American Maize Products Co.* (1915), 60 Ind. App. —, 108 N. E. 610, which case has been considered and determined in connection with this appeal. The principal facts fully appear in the opinion in that case and need not be repeated here.

It appears that on the trial of the case of *American Maize Products Company v. Shedd, et al.*, the hearing of evidence was completed on March 25, 1911, when the case was taken under advisement by the trial court; that in October, 1911, argument was heard on the special finding of facts and the case was continued to November 17, 1911, for further argument on the findings and to fully settle and determine the facts that should be found. At this time the court announced its finding in favor of the plaintiff, the American Maize Products Company. Appellants on the same day

presented their petition and prayed leave to intervene. The court allowed the petition to be filed and afterwards on appellee's motion struck the same from the files and denied appellants the right to intervene. On the same day, and subsequent to the ruling on appellants' petition to intervene, the court filed its special finding of facts and stated its conclusions of law thereon in favor of the plaintiff in that suit, the appellee in this appeal.

The assignments of error present the question of appellants' right to intervene. The petition is based on certain rights to a harbor and the privilege of dredging in the space between the two piers as shown by the finding of facts in *Shedd v. American Maize Products Co.*, *supra*. It is shown that the deeds granting such rights were executed long before the Shedd's granted appellee the easement for the pipe line into Lake Michigan, and that the same were duly recorded.

The petition sets out in detail the facts which show the arrangement for the harbor, the right to dredge, the work previously done in erecting piers and in dredging, the fouling of the water and the laying of the pipes during the pendency of the litigation under the protection of the temporary injunction granted by the court. In substance the petition charges an invasion of appellants' rights by (1) an interference with their right of dredging, (2) a destruction of their right of fishing, and (3) an unreasonable fouling of the water. The petition shows the ownership of the land adjacent to Wolf River outlet or harbor, the provisions of the deeds granting the harbor privileges and the right to lay the pipe line into Lake Michigan and charges that the maintenance of the pipe line will prevent the petitioners "from proceeding with the dredging and excavation of said harbor". It is not alleged or shown in any way that appellants then intended to dredge the harbor or cause the same to be done at any time in the future, nor is it shown that the pipes can not be lowered so as to be below the

Forsyth v. American Maize Products Co.—59 Ind. App. 634.

depth to which dredging will be necessary if the work is undertaken.

In the principal case the court expressly finds that the pipes as laid will interfere with dredging the harbor to a depth suitable for lake vessels, but that the same can be lowered at a cost of one dollar per lineal foot. The findings also show that the pipes do not interfere with any present use of the harbor and show that the refuse from the factory of appellee has been emptied into the outlet continuously from the beginning of operations in 1907, and that the laying of the pipes in no way increases the detrimental effect of such refuse on the water. It also shows that in 1910, a year before appellants sought to intervene, appellee had constructed septic tanks at a cost of \$25,000 to precipitate the solids and avoid the pollution of the water. The findings show pollution of the water but do not show that the pollution is due to the pipes, but do show that the refuse was emptied into Wolf River outlet before the pipes were extended into the water, and after they were laid it passed through the pipes into the water.

The original suit was brought to restrain the defendants in that action from interfering with the laying of the pipes. The case had been on the docket of the trial court for over two years when appellants sought to intervene. They must have known all the time the effect of refuse upon the water in the harbor. Where one seeks to intervene, who

1. is not a necessary party under our statute, the trial court may exercise its discretion and unless there is a clear abuse of such discretion no error is committed in denying the right to intervene. An intervener must be diligent and any unreasonable delay after knowledge
2. of the suit will justify the court in refusing to allow him to intervene, where no satisfactory excuse is shown for the delay and the intervener is not a necessary party to a full and complete adjudication of the rights involved in the controversy. §273 Burns 1914, §272 R. S.

Forsyth v. American Maize Products Co.—59 Ind. App. 634.

1881; *Pottlitzer v. Citizens Trust Co.* (1915), 60 Ind. App. —, 108 N. E. 36; *Smith v. Gale* (1892), 144 U. S. 509, 12 Sup. Ct. 674, 36 L. Ed. 521; *Larue v. American Diesel Engine Co.* (1911), 176 Ind. 609, 614, 96 N. E. 772; *Fischer v. Holmes* (1890), 123 Ind. 525, 24 N. E. 377; *Matter of Reisenberg* (1908), 208 U. S. 92, 111, 28 Sup. Ct. 219, 52 L. Ed. 403.

Appellants' rights in the harbor and appellee's easement for a pipe line all rest in grant by deeds from the owners of the real estate adjoining Wolf River outlet. These

3. instruments must all be considered in determining the rights of the parties and in ascertaining whether they convey inconsistent privileges or whether the several rights granted may coexist without any necessary conflict. *Roush v. Roush* (1900), 154 Ind. 562, 570, 55 N. E. 1017; *Law v. Streeter* (1889), 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271.

The harbor privileges granted appellants and the public are not now affected by the easement or the presence of pipes two and one-half feet below the bed of the

4. harbor. The right to dredge is given appellants but the deeds fix no time within which such work must be begun or completed. It is a mere privilege with no obligation attached, unless the work is undertaken, in which event certain conditions are stated relating to the protection and preservation of the harbor. The easement for the pipe line is not necessarily inconsistent with the right to dredge. Under present conditions they coexist without conflict or injury to any one. If the work of dredging the harbor so as to make it suitable for lake vessels is undertaken, the pipes may be lowered so that the two rights may still coexist without necessary conflict. *Peck v. City of Michigan City* (1898), 149 Ind. 670, 49 N. E. 800; *Law v. Streeter, supra*; *Grafton v. Moir* (1892), 130 N. Y. 465, 29 N. E. 974, 27 Am. St. 533; *Welch v. Wilcox* (1869), 101 Mass. 162, 100 Am. Dec. 113, note 3; *Gerrish v. Shattuck* (1881), 132 Mass.

Forsyth v. American Maize Products Co.—59 Ind. App. 634.

235; *Pomeroy v. Salt Co.* (1882), 37 Ohio St. 520; 14 Cyc 1208. As supporting the foregoing proposition by analogy see, *Town of Cicero v. Lake Erie, etc., R. Co.* (1913), 52 Ind. App. 298, 312, 97 N. E. 389, and cases cited. Appellants have cited *Northern Indiana Land Co. v. Brown* (1914), 182 Ind. 438, 106 N. E. 706, as sustaining their claim to the right to intervene. The facts of that case are not similar to those of the case at bar. Certain petitioners were asking for the construction of a levee. The intervenor showed by his petition that the levee if constructed as prayed for would cause an immediate and permanent damage to his real estate. In the case at bar appellants' petition does not show that the denial of the injunction against the Shedd's would in any way affect them or their property differently from the granting of the injunction. In either event they were left in the identical situation they occupied before asking to intervene. No new, different or additional injury, if any, would result to their property and they lost no right or remedy by the decree entered. The question involved was the right to restrain the Shedd's from interfering with the laying of the pipes east of their pier. Appellants had not interfered, there was no need of restraining them and the granting of the order as already shown, did not affect them or their property.

Appellants insist on a reversal for the reason that their petition was filed and then stricken out on motion of appellee. They insist that this was not the proper practice

5. and that if the petition was insufficient the only way to raise the question was by demurrer. In the view we take of the case appellants were not necessary parties and had no absolute right to intervene. Independent of the question of practice, therefore, the court committed no reversible error in denying them the right to intervene, which was the effect of sustaining appellee's motion to strike the petition from the files. For the foregoing reasons and those stated in *Shedd v. American Maize Products Co.*,

Rock Oil Co. v. Brumbaugh—59 Ind. App. 640.

supra, the judgment is affirmed. Hottel, C. J., Caldwell, Ibach, Moran and Shea, JJ., concur.

NOTE.—Reported in 108 N. E. 622. As to who may become interveners, see 15 Am. Dec. 162. See, also, under (1) 31 Cyc. 519; (2) 31 Cyc. 519, 520; (4) 31 Cyc. 514; (5) 31 Cyc. 669.

THE ROCK OIL COMPANY ET AL. v. BRUMBAUGH.

[No. 8,510. Filed March 26, 1915. Rehearing denied June 22, 1915.
Transfer denied October 14, 1915.]

1. **APPEAL.—Review.—Motion to Make Specific.**—There was no reversible error in the overruling of a motion to require the complaint to be made more specific, where most of the details called for were peculiarly within the knowledge of defendants, who were in no way deprived of any right by the ruling, and where, on the facts of the case, the motion presented a question within the discretion of the trial court. p. 646.
2. **PLEADING.—Complaint.—Averments of Fact.**—In an action for damages from alleged negligence of defendants in permitting oil to escape from their premises, allegations in the complaint charging in substance that tanks containing the oil were constructed by defendants and were insecurely and improperly hooped, were statements of ultimate facts susceptible of proof, and were not mere conclusions of the pleader. p. 647.
3. **NEGLIGENCE.—Complaint.—Sufficiency.—Averment of Independent Acts.**—A complaint for damages resulting from the escape of oil from defendant's premises, was not objectionable because it charged negligence in failing to confine the oil on the premises and to erect walls and barriers that would confine it in the event a tank should burst, and also in the use of improper and insufficient hoops in the construction of the tanks, since a complaint alleging independent, negligent acts or omissions is not insufficient for want of facts if its averments show that any one of them was the proximate cause of the injury complained of. p. 647.
4. **NEGLIGENCE.—Pleading.—Existence of Duty.—Inferences.**—In an action for negligence the complaint need not specifically allege that a duty was owing from defendant to the plaintiff, since the existence of a duty depends upon the facts alleged and the law will imply its existence where the facts pleaded warrant such inference. p. 648.
5. **NEGLIGENCE.—Fire from Escaping Oil.—Complaint.—Sufficiency.**—A complaint for damages on account of a fire caused by oil which defendants negligently permitted to escape from their

Rock Oil Co. v. Brumbaugh—59 Ind. App. 640.

premises, was not insufficient as not alleging that defendants owed plaintiff the duty of keeping the oil securely confined in receptacles on their premises, where enough facts were alleged to show that plaintiff was so situated, as to be entitled to the protection afforded by §9062 Burns 1914, Acts 1913 p. 66, which requires oil and gas produced from wells to be safely and securely confined in wells, pipes or other safe and proper receptacles. p. 648.

6. NEGLIGENCE.—*Fire from Escaping Oil.—Complaint.—Sufficiency.*—A complaint to recover damages on account of a fire caused by oil negligently escaping from the premises of the defendants, was not insufficient for failure to allege that it was practicable to confine the oil so that it would not escape, and even were a showing of practicability requisite, the overruling of a demurrer upon that ground was not error, where facts were alleged which reasonably warranted the inference that it was practicable to so confine the oil. p. 649.
7. NEGLIGENCE.—*Fire from Escaping Oil.—Proximate Cause.—Complaint.*—A complaint charging negligence by defendants in keeping and maintaining their tanks and receptacles in such manner that on the bursting of a tank live crude oil flowed into a ditch maintained by defendants for draining dead oil and waste from their premises, and thence through a second ditch into a public drain that plaintiff was dredging with a steam dredge; that defendants, knowing that the same was liable to ignite and damage plaintiff's property, negligently failed to warn him; that the live oil was similar in appearance and smell to the dead oil and waste hitherto flowing into the ditch; and that it accumulated around the dredge without plaintiff or his servants knowing that it was other than the dead oil or waste and was accidentally ignited by fire from the dredge, etc., causing the dredge to be destroyed, etc.; when construed in the light of the statute requiring oil and gas to be securely confined, and in the light of the law on analogous questions, shows that defendants' negligence was the proximate cause of plaintiff's loss. pp. 649, 651.
8. NEGLIGENCE.—*Proximate Cause.*—To make a negligent act or omission the proximate cause of an injury, it is not essential that the particular or actual consequences must have been anticipated, nor need the act or omission have been the closest in point of time or position to the injury, but the proximate cause is that which causes, or fails to prevent, an injury that might reasonably have been anticipated to result and without which the injury would not have occurred, regardless of the number of intervening or concurring agencies. p. 650.
9. PROPERTY.—*Enjoyment of Property Rights.—Liability.*—One is entitled to the reasonable use of his property even if such use

incidentally injures the property of his neighbor, but, if his use thereof is unreasonable, liability will arise for such injury as might have been anticipated to result therefrom; and where one brings upon his own premises and keeps there anything likely to cause injury or damage to others if it escapes, he must keep it at his peril, and is *prima facie* answerable for all damage which is the natural consequence of its escape. p. 651.

10. NEGLIGENCE.—*Fire from Escaping Oil.—Independent Intervening Agency.*—Where defendants, having knowledge that plaintiff was engaged in dredging a public ditch with a dredge operated by steam generated by burning coal, negligently permitted live oil, similar in appearance and smell to noninflammable, dead oil and waste hitherto flowing therein, to escape into such ditch without warning to plaintiff, who had no knowledge that the oil accumulating about the dredge was other than the dead oil and waste matter, and in the necessary and proper operation of the dredge fire was accidentally brought in contact with the live oil, resulting in its ignition and the destruction of plaintiff's dredge, the firing of the oil was not an independent agency beyond appellants' control which could not reasonably have been anticipated, but was an occurrence that should reasonably have been expected in the usual course of events and according to common experience in handling such oil, and did not break the chain of causation between the negligence alleged and the injury complained of. p. 652.

11. NEGLIGENCE.—*Fire from Escaping Oil.—Verdict.—Answers to Interrogatories.*—In an action for the loss of plaintiff's dredge by fire through the ignition of oil which defendants negligently allowed to escape into a public ditch which plaintiff was dredging, a verdict for plaintiff was not overcome by the jury's answer to an interrogatory to the effect that there was no evidence to show that defendants knew that plaintiff's dredge was located in the ditch below the point where the oil escaped therein, when considered with other answers showing the distance of the dredge from defendants' premises, the length of time it had been in operation, the ability of defendants' servants to see the dredge and hear it when in operation, etc. p. 653.

12. NEGLIGENCE.—*Fire from Escaping Oil.—Contributory Negligence.—Review.*—Where it was alleged that plaintiff's dredge was destroyed by fire through the ignition of live petroleum which defendants negligently permitted to escape into a ditch which the plaintiff was dredging, without informing plaintiff of its presence or that it was other than noninflammable, dead oil and waste matter hitherto flowing in such ditch, the verdict for plaintiff can not be disturbed on the theory that all persons are presumed to know the nature and character of such oil, and that plaintiff's

Rock Oil Co. v. Brumbaugh—59 Ind. App. 640.

employees had notice of the danger before the fire occurred, since the contention does not meet the theory of the complaint, which was supported by some evidence, as well as by the jury's answers to interrogatories, and in view of the fact that it was the duty of defendants under the circumstances shown to take every precaution to avert the danger incident to the presence of the live oil about the dredge, which duty it might have discharged by the giving of timely notice. p. 654.

13. *APPEAL.—Review.—Instructions.*—Objection to certain instructions on the ground that they omit the element of defendants' negligence in stating the condition of liability under the complaint is not available, where other instructions clearly and definitely included the element of negligence and it conclusively appears from the jury's answers to interrogatories that defendants were not harmed by the giving of the instructions complained of. p. 656.

14. *APPEAL.—Review.—Instructions.*—Instructions should be considered as a whole, and if, thus considered, they state the law fairly and accurately, objections thereto are unavailable. p. 656.

From Delaware Superior Court; *Robert M. Van Atta*, Judge.

Action by Jacob Brumbaugh against The Rock Oil Company and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

William A. Thompson and *Richard W. Sprague*, for appellants.

George H. Koons and *George H. Koons, Jr.*, for appellee.

FELT, J.—This suit was brought by appellee against appellants, The Rock Oil Company, Alva L. Kitselman, David M. Kitselman, Edwin Fay Kitselman, Carl M. Kitselman and John W. Smith, to recover damages for the burning of a dredge alleged to have been caused by the negligence of appellants. From a verdict and judgment in appellee's favor this appeal was prayed.

The errors assigned and relied on for reversal are that the court erred in (1) overruling appellants' joint and several motion to make the complaint more specific; (2) in overruling appellants' joint and several demurrer to the complaint; (3) in overruling appellants' joint and several

motion for judgment on the answers of the jury to the interrogatories, notwithstanding the general verdict; (4) in overruling the motion for a new trial.

The substance of the averments of the complaint, omitting averments about which there is no controversy, is as follows: The Rock Oil Company is a corporation and the other defendants are partners doing business under the firm name of Kitselman-Smith Oil Co. and were engaged in operating a large number of oil wells and storing the oil in tanks. On July 8, 1910, appellants had collected and stored large quantities of crude oil in tanks constructed by them, which tanks were insecurely and improperly hooped and liable to burst and let the oil escape therefrom. The oil so stored was highly inflammable, dangerous and liable to do mischief if it should escape from appellants' premises on which it was stored, all of which was well known to appellants, who took no precautions to prevent the same from so escaping, if any of the tanks should burst. Appellants did not place or maintain any walls, inclosures or barricades around said tanks to prevent the escape of the oil from their premises, well knowing the same was liable to escape and damage and destroy appellee's property. Appellants maintained a ditch from their oil field and premises on which their oil tanks were situated, which ditch connected with a certain tributary ditch which ran into and connected with a certain public ditch duly established in pursuance of law, which appellee was then and there engaged in constructing, by means of a dredging machine, in the neighborhood of, and about three-fourths of a mile from, and below, said oil tanks. By means of said drains appellants conveyed salt water and refuse or dead oil substance into the public ditch which appellee was so constructing. The dead or B.S. oil so conveyed was not highly inflammable or dangerous, and floated on the surface of the water in said main ditch and was not distinguishable in appearance from live and highly inflammable oil, which appellants suf-

ferred to escape from their premises as herein alleged. Appellee's servants and agents in charge of and operating said dredging machine had no knowledge or notice and appellee had no knowledge or notice that the oil appellants allowed to escape into said ditch was live oil and highly inflammable, and did not then and there realize or appreciate the danger thereof, and did not discover or know that the same was live oil, or other than an accumulation of said dead or B.S. oil, which had been previously flowing into said ditch. On July 8, 1910, appellee was the owner of the dredge and was engaged in operating the same, in pursuance of a contract regularly entered into by him and the duly authorized drainage commissioner, all of which appellants then and there well knew. The dredge was operated by steam produced by the use of coal as fuel and on said day, while the machine was carefully and properly operated in dredging the ditch, appellants carelessly and negligently suffered and permitted one of said tanks containing live oil, which was so insecurely hooped and maintained as aforesaid, to burst by reason of not being securely hooped, and negligently and carelessly suffered and permitted large quantities of live, gaseous and highly inflammable oil to escape from their premises and to flow through the ditches into the public ditch where appellee was using the dredge and to accumulate on the surface of the water around the dredge, well knowing the same would endanger appellee's dredge and property and was liable to be ignited and burn and destroy the property, all without giving appellee or his agents or employes in charge of the dredge any notice of the inflammable character of the oil. The oil became ignited from a spark, or hot cinders, or coals of fire, or hot substance of some kind, accidentally falling upon or into the oil from the furnace used in operating the dredge, which was then and there necessarily fired and operated in a careful and proper manner at the usual and proper time in the necessary operation of the dredge. The dredge was thereby

burned and destroyed, without any fault or negligence on the part of appellee or any of his employes or servants in charge of and operating the same, to appellee's damage in the sum of \$6,000. All of which loss and damage was directly and proximately caused by the negligent failure of appellants to keep their tanks aforesaid containing live oil, properly hooped so as to prevent their bursting and to prevent the escape of live oil from appellants' premises through said ditches into the public ditch where appellee was operating said dredge and by the negligent failure of appellants to surround said tanks with walls or barricades to prevent the escape of live oil from their premises and thereby flow into the public ditch aforesaid.

The appellants moved the court to require appellee to make his complaint more specific in numerous matters of description and detail, viz., to set out, more par-

1. ticularly the alleged negligence in permitting the oil to escape, in what respect they were negligent in the construction and maintenance of their oil tanks; to describe more particularly the nature and character of the dead, or B.S. oil, and of the live oil mentioned in the complaint; to describe more particularly where and how the oil floating on the water around the dredge took fire. Most of the details called for were peculiarly within the knowledge of appellants who were in no way deprived of any right by the overruling of the motion. On the facts of this case, the motion presented a question within the discretion of the trial court and no reversible error was committed by the ruling thereon. *Terre Haute Brew. Co. v. Ward* (1914), 56 Ind. App. 155, 102 N. E. 395, 105 N. E. 58; *Cleveland, etc., R. Co. v. Bowen* (1913), 179 Ind. 142, 100 N. E. 465; *Kinmore v. Cresse* (1913), 53 Ind. App. 693, 696, 102 N. E. 403; *Knickerbocker Ice Co. v. Gray* (1908), 171 Ind. 395, 401, 84 N. E. 341.

Appellants assert the insufficiency of the complaint on the ground that the allegations as to the defective hoops

on the tanks are not statements of fact but mere conclusions of the pleader; that the complaint shows no duty on the part of appellants to surround their oil tanks with walls or barriers to prevent the escape of the oil, and there is no averment that it was practicable so to do; that the complaint fails to show that the alleged negligence was the proximate cause of the injury complained of; that the complaint shows that the fire which destroyed the dredge was caused by a responsible intervening agent for which appellants were in no way responsible. The complaint

2. charges in substance that the tanks containing the live oil were constructed by appellants and were insecurely and improperly hooped. These are statements of ultimate facts susceptible of proof and are not mere conclusions of the pleader. *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 404, 97 N. E. 822; *Morgantown Mfg. Co. v. Hicks* (1910), 46 Ind. App. 623, 627, 92 N. E. 199; *Dieckman v. Louisville, etc., Traction Co.* (1910), 46 Ind. App. 11, 19, 89 N. E. 909, 91 N. E. 179; *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 496, 77 N. E. 945.

The complaint attempts to state in one paragraph two independent acts or omissions of appellants which caused the destruction of appellee's dredge, one the negli-

3. gent failure to confine the live oil on appellants' premises and to erect walls or barriers around the tanks to confine the oil in case one should burst, and the other, the use of improper and insufficient hoops in the construction and maintenance of the tanks in which the live oil was stored. Such independent acts or omissions may be so alleged and if the averments show any one of them to have been the proximate cause of the alleged injury, the pleading will withstand a demurrer for insufficiency of facts to state a cause of action. *Merica v. Fort Wayne, etc., Traction Co.* (1912), 49 Ind. App. 288, 293, 97 N. E. 192.

The complaint does not allege that appellants owed ap-

pellee the duty of keeping the live oil securely confined in receptacles on their premises. But the existence of

4. a duty depends upon the facts alleged and the law will imply the existence of a duty where the facts pleaded warrant such inference. *Chicago, etc., R. Co. v. Lain* (1908), 170 Ind. 84, 89, 83 N. E. 632.

In this State we have a statute (§9062 Burns 1914, Acts 1913 p. 66) which requires oil and gas produced from wells to be safely and securely confined in wells, pipes or other safe and proper receptacles. The complaint shows the relative location of the oil tanks, the ditches and the dredge and it is alleged that appellants negligently took no precautions to confine the live oil on their premises and negligently failed to erect and maintain any walls or barriers around the tanks, so insecurely hooped, well knowing they were liable to burst and that the oil might escape and damage appellee's property. The statute does not mention walls or barriers, but there is enough in the complaint to bring it within the purview of the statute, the object of which is to require persons producing live oil from wells to confine it securely and safely in receptacles on their premises so as to prevent its escape. *Southern R. Co. v. Howerton* (1914), 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369. The statute is penal and was enacted for the protection of the general public. The averments show that appellee was so situated as to be entitled to the benefit of its provisions. By virtue of this statute, it was the duty of appellants to confine the live oil in suitable receptacles on their premises so as to prevent its escape. Considering the facts alleged in the light of this statute, they compel the inference that appellants owed appellee the duty of confining their live oil on their premises. They also show a violation of that duty resulting in damage to appellee. *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1915), 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739, and cases cited.

In our view, the objection that the complaint is insuffi-

cient on the theory of failure to confine the oil on appellants' premises because it does not specifically charge

6. that it was practicable to so confine the oil, is untenable. Counsel rely on the holdings under the statute requiring dangerous machinery to be guarded. The reason of the rule announced is that in many instances it is impossible to guard machinery without practically destroying the machines for the purpose they are intended to subserve. In every instance it is possible to confine oil securely in receptacles that will prevent its escape without interfering with its production or the use to be made of it. Where the reason of a rule fails, the rule has no application. But if it were essential to show that it was possible and practicable to confine the live oil and prevent its escape, we think under the decisions which bring to the aid of a pleading all reasonable inferences that may be drawn from the facts averred, we are authorized to draw such inference from the facts alleged in the complaint under consideration. The ditches were constructed and used to carry off the B.S. or dead and refuse oil and the salt water from the oil field, but such use could be made of them, and in fact as shown by the complaint, was made of them, generally, without in any way interfering with the keeping of the live oil in receptacles that would prevent its escape from the premises to the damage of other persons. *Domestic Block Coal Co. v. DeArney* (1913), 179 Ind. 592, 601, 100 N. E. 675, 102 N. E. 99.

It is also stated that if the complaint be otherwise sufficient on the theory of negligence in using improper and insecure hoops on the tanks or in failing to confine

7. the oil on appellants' premises, it is bad because it fails to show that either of the alleged acts of negligence was the proximate cause of the fire which destroyed appellee's dredge, and for the further reason that the averments show the fire was caused by a responsible intervening agent for which appellants were in no way responsible. The

complaint shows that appellants constructed and maintained a ditch from their oil tanks which connected with another drain which emptied into the public ditch in which appellee was operating his dredge below the tanks and that the dead, or B.S. oil, had previously flowed through said ditches and accumulated around the dredge and was not highly inflammable, but was similar in smell and appearance to live and inflammable oil; that the dredge was operated by steam produced by fire in which coal was used for fuel, all of which was known to appellants; that appellants negligently allowed the live, crude, petroleum oil to escape from their tanks and premises and to flow down through said ditches to appellee's dredge well knowing the same was liable to be ignited and damage appellee's property and negligently failed to warn appellee or his servants in charge of his dredge, that the oil from the tanks had escaped and was different from that which had previously flowed down and around the dredge and was live and inflammable oil; that the live oil accumulated around the dredge without appellee or his servants knowing that it was other than the dead or B.S. oil and was accidentally ignited by fire from the dredge which was being properly operated in the usual manner.

The proximate cause of an injury is not necessarily that which is nearest in point of time or position to the injurious result produced, but it is the act, omission or thing

8. which causes, or fails to prevent, an injury that might reasonably have been anticipated would result from the negligent act or omission charged, and without which such injury would not have occurred. The test is to be found in the injurious consequences that might reasonably be anticipated, and not in the number of subsequent events or agencies that might intervene or concur in bringing about such consequences. The particular or actual consequences need not be anticipated. *Cincinnati, etc., R. Co. v. Armuth* (1913), 180 Ind. 673, 677, 103 N. E. 738, and cases cited.

The principle embodied in the maxim, *Sic utere tuo*

Rock Oil Co. v. Brumbaugh—59 Ind. App. 640.

ut alienum non laedas,—"So use thine own that another you may not injure"—is recognized and enforced in 9. this State as a rule of property. *Niagara Oil Co. v. Jackson* (1911), 48 Ind. App. 238, 241, 91 N. E. 825; *Fort Wayne Cooperage Co. v. Page* (1908), 170 Ind. 585, 589, 84 N. E. 145, 23 L. R. A. (N. S.) 946; *Island Coal Co. v. Clemmitt* (1897), 19 Ind. App. 21, 49 N. E. 38. One is entitled to the reasonable use of his property even if such use incidentally injures the property of his neighbor, but liability for an injury arises when it is caused by such unreasonable use of one's property as might have been anticipated to result in damage to the person or property of others in the vicinity. Both our courts of last resort have approved the rule declared in the case of *Fletcher v. Rylands* (1866), L. R. 1 Exch. *265, *278, to the effect that the person who for his own purposes brings on his lands and collects and keeps there anything likely to cause injury and damage to the property of others if it escapes, must keep it at his peril, and if he fails to do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. *Niagara Oil Co. v. Jackson*, *supra*, and cases cited; *Niagara Oil Co. v. Ogle* (1912), 177 Ind. 292, 296, 297, 98 N. E. 60, Ann. Cas. 1914 D 67, 42 L. R. A. (N. S.) 714, and cases cited; *Ohio Oil Co. v. Westfall* (1909), 43 Ind. App. 661, 663, 88 N. E. 354.

The averments of the complaint are to be construed in the light of the statute requiring oil and gas to be securely confined in suitable receptacles, and in the light of

7. the law as declared by our courts of last resort on questions analogous to those presented by the pleading. When so considered, the alleged negligent acts and omissions of appellants are shown to have been the proximate cause of appellee's alleged loss of property.

We have yet to consider the further question of a responsible intervening agency. The complaint alleges that appellee was operating the dredge in a public ditch below

the oil tanks in plain view of appellants and had been
10. so operating since May 12, prior to the fire on July
8; that appellee was using coal for fuel to produce
steam, all of which was known to appellants; that in the
necessary and proper operation of the dredge fire was acci-
dentally brought in contact with the live or pretroleum oil,
the presence of which was unknown to appellee and his
employees; that the oil was thereby ignited and the dredge
destroyed by fire. This court in *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 822, in an opinion
by Lairy, J., gave extended consideration to the question
of an intervening responsible agency, and on page 403
said: "If, under the circumstances, the intervention of
such an agency in the manner stated might reasonably have
been expected in the usual course of events and according
to common experience, then the chain of causation, extend-
ing from the original, wrongful act to the injury, is not
broken by the independent, intervening agency, and the
original wrongful act will be treated as a proximate cause."
We adopt this language as applicable to the complaint under
consideration. Considering the averments as to the presence
and character of the dead or B.S. oil, the live and inflam-
mable oil, the escape of the latter into the ditch through
which it would naturally pass to the public ditch on which
the dredge was operated by steam and the knowledge thereof
on the part of appellants, we hold that the firing of the
oil under the circumstances alleged was not an independent
agency beyond appellants' control which could not reason-
ably have been anticipated, but that it was an occurrence
that should reasonably have been expected in the usual
course of events and according to common experience in
handling such oil, and, therefore, that it did not break the
chain of causation extending from the original wrongful
acts and omissions of appellants alleged in the complaint
and therein shown to have been the proximate cause of the
alleged injury.

The complaint proceeds on the theory of negligence. There is authority for holding that the alleged acts and omissions constitute a cause of action independent of the element of negligence, but inasmuch as the complaint was drawn, and the case tried, on the theory of negligence, we do not decide the question of the sufficiency of the facts alleged to state a cause of action independent of the allegations of negligence. The complaint states a cause of action both for the alleged negligent acts and the alleged negligent omissions of appellants. *Niagara Oil Co. v. Jackson, supra*; *Niagara Oil Co. v. Ogle, supra*; *Ohio Oil Co. v. Westfall, supra*; *Brennan Constr. Co. v. Cumberland* (1907), 29 App. Cas. (D. C.) 554, 15 L. R. A. (N. S.) 535, 10 Ann. Cas. 865; *Gilson v. Delaware, etc., Canal Co.* (1892), 65 Vt. 213, 26 Atl. 70, 36 Am. St. 802; *Cahill v. Eastman* (1872), 18 Minn. 324, 10 Am. Rep. 184; *Pfeiffer v. Brown* (1895), 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. 660; *City of Lebanon v. Twiford* (1895), 13 Ind. App. 384, 388, 41 N. E. 844; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.* (1911), 48 Ind. App. 584, 92 N. E. 989, 95 N. E. 596; *Knapheide v. Eastman* (1874), 20 Minn. 478; *Berger v. Minneapolis Gas Light Co.* (1895), 60 Minn. 296, 301, 62 N. W. 336; *Williamson v. Yingling* (1881), 80 Ind. 379; *Bowling Coal Co. v. Ruffner* (1906), 117 Tenn. 180, 100 S. W. 116, 10 Ann. Cas. 581, 9 L. R. A. (N. S.) 923; *Hindson v. Markle* (1895), 171 Pa. St. 138, 33 Atl. 74; *Straight v. Hover* (1909), 79 Ohio St. 263, 277, 87 N. E. 174, 22 L. R. A. (N. S.) 276; *Salem Iron Co. v. Hyland* (1906), 74 Ohio St. 160, 77 N. E. 751; *Drake v. Lady Enslly Coal, etc., R. Co.* (1893), 102 Ala. 501, 14 South. 749, 48 Am. St. 77, 24 L. R. A. 64; *Beach v. Sterling Iron, etc., Co.* (1895), 54 N. J. Eq. 65, 33 Atl. 286.

The court submitted 373 interrogatories which were answered by the jury. The answers generally support the allegations of the complaint and are not in irreconcilable conflict with the general verdict. One of the principal contentions of appellants is based on the

answer of the jury to a question asking if appellants or any of their employes knew the dredge was below the point where the skiff ditch emptied into the public ditch, to which the jury answered "No evidence to show that they did." The jury by other answers found that the dredge was about 600 feet below the point where the ditch emptied the oil into the public ditch on which the dredge was operated and that the dredge was and for a long time prior to the day of the fire, had been in plain view from the oil tanks and vicinity and that appellants' servants were so situated as to be able to see the dredge and hear it when in operation; that it had been operated day and night for some time prior to the fire; that the oil tank burst between 11 and 12 o'clock on July 8, 1910, and the fire occurred at about 6:15 p.m. of that day just after the night shift of hands had taken charge of the dredge; that appellants' servants were at the tanks soon after the hoops gave way. The findings relied on do not support appellants' contention as against the general verdict and when considered in connection with the other answers are wholly insufficient to overcome it.

Both upon the answers to the interrogatories and the motion for a new trial appellants contend that contributory negligence is conclusively established. The argument

12. is based mainly upon the proposition that appellee's servants were bound to know that the oil around the dredge was live, crude petroleum and highly inflammable and that they had such knowledge before the oil was ignited; that there was no obligation on appellants to notify them of such facts because all persons are presumed to know the nature and character of such oil; that the evidence shows appellee's employes had notice of the danger before the fire occurred. The complaint proceeds on the theory that the dead, or B.S. oil, had been around the dredge before the day of the fire and was not inflammable or dangerous, but had the smell and general appearance of live oil when on the water, and that these facts were known to appellee and

his employes operating the dredge. There is evidence tending to prove these allegations. The complaint also proceeds on the theory that appellants, in view of this situation, should have notified appellee of the escape of the live oil. The contention that every one is bound to know the inflammable nature of live petroleum does not meet the situation. There was testimony tending to prove that the presence of the dead oil around the dredge did not endanger appellee's property, and as appellants must have known that the live, inflammable oil would likely reach the dredge operated by steam, it was their duty to take every precaution to avert the danger incident to the presence of the inflammable oil around the dredge, and this duty could best be discharged by timely notice, not of the general nature and character of crude petroleum oil, but of the kind of oil that was then about to come in contact with the dredge. The men in charge of the dredge testified, and the jury found, that they had no notice or knowledge that the oil around the dredge was live, inflammable oil until it took fire. As to actual notice, there was some testimony that some one suggested to one of the hands—a "roustabout"—on the dredge some hours before the fire that the oil might take fire and that the man replied that it was dead oil and would not burn. The evidence was disputed on some points and in view of the general verdict and other answers to interrogatories is wholly insufficient to conclusively establish contributory negligence. The evidence shows that the jury found that the fireman in cleaning out the cinders started to throw a shovel full of apparently dead cinders toward the bank of the ditch and another workman called to him not to throw it for there might be danger; that he did not throw it, but in drawing it back a small portion fell into the oil and ignited it. The man who gave the warning testified he did not know of any danger or of the presence of live oil at the time and had not thought of it until he saw the fireman about to throw the cinders out and

that it then occurred to him that there might be danger and he immediately called to the fireman. The fireman testified and the jury found that he did not know of the presence of the live oil or of any danger therefrom before the fire started from cinders falling into the ditch. The jury expressly found that the fire was caused by cinders or other hot substance accidentally falling into the ditch from the dredge. There is evidence to support the material allegations of the complaint. The question of contributory negligence was rightly submitted to the jury and we are not warranted on the showing made either by the answers to interrogatories or the evidence to disturb the finding.

Objection is also made to some of the instructions on the ground that they omit the element of appellants' negligence in stating the conditions of liability under the

13. complaint. Conceding that some of the instructions are subject to this criticism, others clearly and definitely included the element of negligence. Furthermore, the answers to the interrogatories cover all the details of the case and show conclusively that the jury found that appellants were negligent in each of the respects alleged in the complaint. The record, therefore, shows that the verdict of the jury was based on a finding that appellants were guilty of negligence both in the doing and in the omission of the acts and things alleged in the complaint. Therefore appellants were not harmed by the giving of the instructions of which complaint is made. Instruc-

14. tions should be considered as a whole. When so considered the instructions in this case fairly and accurately state the law applicable to the case.

The case seems to have been fairly tried on the merits and a correct result reached. There is no intervening error which will warrant a reversal. §§407, 700 Burns 1914, §§398, 658 R. S. 1881. Judgment affirmed.

Hottel, C. J., Caldwell, P. J., Ibach, Moran and Shea, JJ., concur.

McClain v. Steele—59 Ind. App. 657.

NOTE.—Reported in 108 N. E. 260. Proximate and remote causes of injury from negligence, see 50 Am. Rep. 569; 36 Am. St. 807. Liability of one keeping oil on his lands for injury resulting from its escape, see 10 Ann. Cas. 868; Ann. Cas. 1914 D 70. See, also, under (1) 31 Cyc. 670; (2) 31 Cyc. 49; (3) 29 Cyc. 569; (4) 29 Cyc. 567; (5) 29 Cyc. 568; (6) 29 Cyc. 565; (7) 29 Cyc. 572; (8) 29 Cyc. 488, 493, 496; (9) 29 Cyc. 459; (10) 29 Cyc. 501; (11) 29 Cyc. 658; (12) 29 Cyc. 659; (13) 38 Cyc. 1785; (14) 38 Cyc. 1778.

McCLAIN v. STEELE.

[No. 8,664. Filed October 14, 1915.]

1. VENUE.—*Change of Venue.—Statutes.*—The statutory provision for a change of venue in a civil cause upon proper application therefor is imperative, and a denial of a change of venue under such circumstances is reversible error. p. 659.
2. VENUE.—*Refusal of Change.—Presenting Question on Appeal.*—In order to predicate error on the ruling on an application for a change of venue, the same must be properly assigned as a ground in the motion for a new trial. p. 660.
3. NEW TRIAL.—*Grounds.—Refusal of Change of Venue.—Error of Probate Commissioner.*—A motion for a new trial alleging that the probate commissioner, to whom the cause had been referred by the circuit court for trial and finding, erred in overruling defendant's motion for a change of venue, does not present the question of whether the trial court erred in the overruling of such motion. p. 660.
4. APPEAL.—*Review.—Overruling Motion for New Trial.*—Where the specifications in a motion for new trial were such as to present no questions for review, there was no error in the overruling of same. p. 660.

From Gibson Circuit Court; *Herdis F. Clements*, Judge.

Action by Charles A. Steele against Silas McClain. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William E. Henderson, *Charles B. Clarke* and *Walter C. Clarke*, for appellant.

James B. Gamble, for appellee.

MORAN, J.—The only question before the court for consideration is, Was appellant erroneously deprived of a change

of venue from Gibson County where this suit was originally filed? On April 4, 1912, appellee filed a complaint in the Gibson Circuit Court against appellant, to recover an indebtedness which he alleged was due him from appellant, and to have a deed of conveyance held by him from appellant on certain real estate in Gibson County, Indiana, to secure the indebtedness, declared a mortgage; that the same be foreclosed and a receiver be appointed to take charge of the real estate during the pendency of the suit. On April 14, 1912, appellee filed a second paragraph of complaint, which as to the relief demanded does not differ from the first paragraph, and on April 15, 1912, a receiver was appointed. On May 27, 1912, appellant answered the complaint by general denial, and on June 1, 1912, the cause was ordered referred to the probate commissioner of the Gibson Circuit Court for trial and finding. On June 5, 1912, the cause was recalled from the probate commissioner and appellant filed a cross-complaint and two affirmative paragraphs of answer to the complaint. By the cross-complaint and the third paragraph of answer, appellee sought an accounting between himself and appellant; the issues were closed by an answer in one paragraph to the cross-complaint and a reply in general denial to the affirmative paragraphs of answer, thereupon the cause was again referred to the probate commissioner. On September 13, 1912, upon application of appellant, a *nunc pro tunc* entry was entered of record showing that on June 18, 1912, more than three days before the trial of said cause, appellant filed his application supported by affidavit for a change of venue from Gibson County. No ruling was had upon the application for a change of venue. On August 28, 1912, appellant through his counsel entered a special appearance before the probate commissioner and moved to remand the cause to the Gibson Circuit Court, for the want of jurisdiction in the probate commissioner, by reason of there being on file in the Gibson Circuit Court an application for a

change of venue from the county, which had not been ruled on. This motion was overruled, to which appellant excepted. On September 14, 1912, the probate commissioner filed his report, showing that there was due appellee from appellant \$2,746.49. The report further discloses that a trial was had before the probate commissioner including the argument of counsel, to which report appellant objected, on the grounds that the probate commissioner had no jurisdiction by reason of the application for a change of venue from the county, as aforesaid. Appellant moved for a new trial before the probate commissioner, which motion the probate commissioner refused to receive and file in the cause. On September 24, 1912, the court examined the report of the probate commissioner and found for appellee on both paragraphs of his complaint, adopting as his findings the report of the probate commissioner, upon which judgment was rendered. On November 22, 1912, appellant filed a motion for a new trial; that part of which is necessary to present the question under consideration is: "1. The probate commissioner erred in overruling defendant's motion for a change of venue in this cause. 2. The probate commissioner erred in assuming jurisdiction of this cause while an affidavit for a change of venue of this cause from Gibson County, Indiana, was on file and pending in this cause." These causes for a new trial appellant in his brief contends come within the first subdivision of the statute for a new trial, viz., irregularity in the proceedings of the court, jury or prevailing party, or any order of court, or abuse of discretion, by which the party was prevented from having a fair trial.

The language of the statute with reference to the granting of a change of venue in a civil cause is that the court in term, or the judge thereof in vacation, shall change

1. the venue, upon the application of either party, made upon affidavit, showing one or more of the causes enumerated in the statute. The language of the statute is

McClain v. Steele—59 Ind. App. 657.

imperative, as it is made the duty of the court to grant the change of venue when proper steps have been taken by the litigant, and under such circumstances, it is available error to refuse the application. *Louisville, etc., R. Co. v. Martin* (1897), 17 Ind. App. 679, 47 N. E. 394; *Rout v. Ninde* (1889), 118 Ind. 123, 20 N. E. 704. In order to

predicate error on the ruling on an application for

2. a change of venue, the same must be properly assigned as a cause for a new trial. *Southern R. Co. v. Sittasen* (1906), 166 Ind. 257, 76 N. E. 973; *Mannix v. State, ex rel.* (1888), 115 Ind. 245, 17 N. E. 565; *Scanlin v. Stewart* (1894), 138 Ind. 574, 37 N. E. 401, 38 N. E. 401; *Wilson v. Johnson* (1896), 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; *Goodrich v. Stangland* (1900), 155 Ind. 279, 58 N. E. 148.

By the causes assigned for a new trial, appellant does not complain of the conduct of the trial court in refusing him a change of venue; the complaint is made of

3. the probate commissioner in this behalf. With the record in this shape, the motion for a new trial does not present the question sought to be raised on appeal. *St. Joseph Mfg. Co. v. Hubbard* (1905), 36 Ind. App. 84, 75 N. E. 17. Appellant after he filed his application for a change of venue from the county, appeared before the probate commissioner before whom the evidence in the cause was taken, without first insisting on the court ruling on the motion for a change of venue. Now as to whether his conduct in this particular constituted a waiver on his part as to any error that might be based thereon, we need not decide, in view of the conclusions we have reached as to the sufficiency of the motion for a new trial. By

4. reason of the infirmities in the motion for a new trial, no error was committed by the trial court in overruling the same. Judgment affirmed.

NOTE.—Reported in 109 N. E. 793. As to change of venue, see 74 Am. Dec. 241. See, also, under (1) 40 Cyc. 117; (2) 3 C. J. 973; 29 Cyc. 752; (4) 29 Cyc. 942.

Lamphier v. Karch—59 Ind. App. 661.

LAMPHIER v. KARCH ET AL.

[No. 8,649. Filed October 27, 1915.]

1. **BRIDGES.—Injuries from Defects.—Liability of Officers.**—Considered in the light of existing statutory provisions and declared rules of law relative to the maintenance and repair of highways and bridges, any obligation resting on a township trustee and road supervisor to repair a bridge is in the nature of a duty owing to the State or public at large, rather than to individuals distributively, and such officials are not liable in their personal capacity in an action to recover damages for injury to a horse resulting from a mere failure to repair a bridge. pp. 662, 663, 665, 666.
2. **HIGHWAYS.—Officers.—Duties.**—Under the provisions of §7763 Burns 1908, Acts 1907 p. 371, relating to the duties of a road supervisor the township trustee is the superior officer and the supervisor must carry out his orders with reference to highways when specifically given. p. 663.
3. **HIGHWAYS.—Duty of Supervisor.—Mandamus.**—The duty of a supervisor to keep highways in good repair is a public duty, imperative and not discretionary, and he may be compelled by mandate to perform such duty. p. 663.
4. **BRIDGES.—Highways.—Title of State and Local Subdivisions.—Repairs.**—Public highways are established and opened, and bridges as a part thereof are built, pursuant to legislative authority, and, in the absence of statutory provision to the contrary, the ownership of such public ways is in the State at large rather than in the local subdivisions; hence the duty of making repairs, though discharged through proper boards and officers of the local subdivisions, rests fundamentally on the State, and such agencies in the discharge of such duty are in fact the agencies of the State. p. 665.
5. **BRIDGES.—Duty to Repair.—Official Discretion.**—While the duty to repair bridges is in a sense absolute, yet in the very nature of the case there is room for the exercise of official discretion as to the character and extent of the repairs to be made, and the time when they should be made, etc., all of which must of necessity depend on the importance of the bridge when measured by the frequency and nature of the use to which it is subjected. p. 666.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action by George Lamphier against Fred Karch and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

John A. Dunlap and *E. M. LaRue*, for appellant.

W. H. Parkinson and *Abraham Halleck*, for appellees.

CALDWELL, J.—Appellant's horse, while being led by him along a public highway of road district No. 2 in Walker Township, Jasper County, stepped into a hole in

1. the floor of a bridge that spanned a ditch crossing the highway, and was injured. Appellee Karch at the time was trustee of the township, and appellee Brown was supervisor of the road district. Appellant brought this action against appellees as individuals to recover damages on account of injuries to the horse. The action is predicated on the alleged negligent failure of appellees as such officials to keep the bridge in repair. The demurrer of each appellee to the complaint was sustained, and judgment rendered against appellant for failure to plead over. This appeal presents the single question of whether a township trustee or a road supervisor, as an individual, is liable to respond in damages to any one who suffers an injury in his person or property by reason of the failure of such official to keep in repair a bridge which is on the line and a part of a public highway within his jurisdiction.

Appellant states his proposition as follows: "Appellant does seek to charge the appellees with a personal liability for negligent failure to perform duties required of them in their official capacity as trustee and road supervisor. He is not attempting to charge the township with any liability." No question of malfeasance or misfeasance is involved. On the question presented here, there is so much discord among the decisions of courts of appeal of the various jurisdictions that to harmonize them is impossible. See cases collected in notes to the following: *Tholkes v. Decock* (1914), 52 L. R. A. (N. S.) 142; *Bates v. Horner* (1893), 22 L. R. A. 824; *Worden v. Witt* (1895), 95 Am. St. 70. We proceed to determine the matter in the light of our own statutes. Statutory provisions to the following

effect were in force at the time of the transaction involved here: Any person who has official supervision of the roads in any district, and who fails to keep the ways and bridges in such district in as good repair as the available means will enable him to do is liable to a fine on conviction. §2435 Burns 1908, Acts 1905 p. 584, §529. The road supervisor who fails to use due diligence in keeping the highways of his district in good repair, under the regulations prescribed by statute, is liable to a penalty recoverable for the benefit of the district. §7784 Burns 1908, Acts 1905 p. 521, §114. He may use timber standing within the limits of a highway for the purpose of repairing such highway or any bridge thereon. §7777 Burns 1908, Acts 1905 p. 521, §108. "Such supervisor * * * shall carry into effect all orders of the trustee of the township in which the road district is situated, touching the highways and bridges therein, and keep the same in good repair. * * * Such supervisors shall have charge of and work and keep in good repair the roads of their respective districts. They shall be subject to the control and direction of the township trustee."

2: §7763 Burns 1908, Acts 1907 p. 371. The trustee is the superior officer, and the supervisor must carry out his orders when specifically given. *State, ex rel.*

3. *v. Clifton* (1901), 157 Ind. 581, 62 N. E. 271. The duty of a supervisor to keep highways in good repair is a public duty imperative and not discretionary, and he may be compelled by mandate to perform such duty. *State, ex rel. v. Kamman* (1898), 151 Ind. 407, 51 N. E. 483. The township advisory board is authorized to levy a road

1. tax on an estimate made by the trustee, and the trustee with the consent of the advisory board may levy an additional road tax to be expended for the construction and repair of bridges and for other road purposes. §7780 Burns 1908, Acts 1905 p. 521, §110. The trustee controls the expenditure of the funds so arising, and he may pay the same out, as he may deem necessary on

the order of road supervisors for work done by them under his direction. §7781 Burns 1908, Acts 1905 p. 521, §111. The trustee may let the contract for the improvement or repair of highways and bridges to the lowest responsible bidder. §7782 Burns 1908, Acts 1905 p. 521, §112. If the township trustee shall notify the board of county commissioners of the necessity of locating or repairing any bridge or culvert in his township, the commissioners, if they deem that public convenience requires the work to be done, are required to make surveys and estimates and provide for doing the work; but if the board shall not deem the work to be of sufficient importance to justify an appropriation from the county treasury, the trustee may appropriate any part of the road fund to that end if he believes it expedient. §7778 Burns 1908, Acts 1905 p. 521, §109. Whenever in the opinion of the board of commissioners, public convenience requires that a bridge be repaired or built, the board is required to direct that the work be done pursuant to plans, etc. If the board believes the work to exceed the ability of the road district by the application of its ordinary road work and tax, the commissioners may use any appropriation from the county treasury to that end. §7687 Burns 1908, Acts 1907 p. 374. "The board of commissioners of every county shall cause all bridges therein to be kept in repair." §7691 Burns 1908, Acts 1905 p. 521, §43. "That in addition to the duties now conferred on them by law in respect to the care of highways, it shall be the duty of the board of commissioners, township trustees, road superintendents and road supervisors to keep in repair and in passable condition all highways in their respective districts or jurisdictions along or on which United States free delivery mail routes have been or may hereafter be established and maintained * * *. In making such repairs the board may repair bridges or culverts * * *." §7779 Burns 1908, Acts 1907 p. 208. There is no statute

in this State rendering a township trustee or a road supervisor personally liable for neglecting or failing to repair highways or bridges.

Public highways are established and opened, and bridges as a part thereof are built pursuant to legislative authority. In the absence of statutory provision to the con-

4. trary, the ownership of such public ways is in the State at large rather than in some local subdivision.

Karr v. Board, etc. (1908), 170 Ind. 571, 575, 85

1. N. E. 1; *Cummins v. Pence* (1910), 174 Ind. 115,

119, 91 N. E. 529. Since public highways and bridges

as a part thereof are owned by the State, it would seem apparent that fundamentally the duty to keep them in repair rests on the State. The State, however, as appears from the foregoing digest of the statutes, has delegated that duty to certain political or governmental subdivisions, as counties, townships, etc. These subdivisions, however, discharge such duties through certain agencies, as boards of county commissioners, township trustees, road supervisors and other officials. The State, through its legislative department provides for selecting these agencies, prescribes their respective duties, and fixes penalties for failure to perform such duties. As the duty to repair public ways rests fundamentally upon the State, it appears that these agencies are in fact agencies of the State created by it for the purpose among others of performing such duty, and through which the State does perform it. Such agencies in repairing public highways and bridges are therefore doing the State's work. Thus, there are certain statutes by virtue of which local officials may appropriate private property for the purpose of road and bridge repair, as §§7775, 7777 Burns 1908, Acts 1905 p. 521, §§106, 108. Only sovereign power may take private property for a public use. The exercise of the power granted by such statutes is justified on the theory that the taking is by the State for pur-

poses of the State, through agencies created by it. *Dronberger v. Reid* (1859), 11 Ind. 420; *Jeffersonville, etc., R. Co. v. Daugherty* (1872), 40 Ind. 33.

While the duty to repair bridges is in a sense absolute, yet in the very nature of the case there is room for the exercise of official discretion. As to whether a given

5. bridge should be established or repaired, and the state of repair in which it should be kept, and the order in which repairs should be made upon the

1. various bridges within a particular jurisdiction, must of necessity depend on the importance of the bridge when measured by the frequency and nature of the use to which it is subjected. Moreover, from a consideration of the statutes cited herein, it appears that in so far as concerns road supervisors, township trustees and boards of commissioners, the delegated duty to repair bridges is in a sense distributed among them with no duty resting upon either class of officials sufficiently comprehensive to include all cases of proposed repair. Thus, a road supervisor is subject to the control and direction of the trustee, and the duty delegated to each of these officers is limited by the existence of available means. The fact that in a given case or that respecting a particular work of repair, such limitation becomes effective, invokes the performance of the duty delegated to boards of county commissioners by the use of county funds in repairing bridges. As said by the Supreme Court in *Board, etc. v. Allman* (1895), 142 Ind. 573, 585, 42 N. E. 206, 39 L. R. A. 58, "the board of commissioners can only cause bridges to be repaired by an appropriation of county funds to pay the expense, when the road district is not able, by its road work and tax, to make the same, and the commissioners deem the bridge of sufficient importance to appropriate the county funds for that purpose, and in such case the expense must be borne by the road district, so far as it is able, and the residue by the county."

It thus appears that road supervisors and township trustees in prosecuting the work of repairing bridges act as agents of the State, rather than as agents of individuals, and that the delegated duty to do such work is to an extent distributed among them and other agencies. It is a well-established principle that "no man can have any ground for a private action until some duty owing to him has been neglected; and if the officer owed him no duty, no foundation can exist upon which to support an action." Cooley, Torts (3d ed.) 756. "The rule of official responsibility then appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. Cooley, Torts (3d ed.) 757. See, also, *State, ex rel. v. Harris* (1883), 89 Ind. 363, 46 Am. Rep. 169; *Moss v. Cummings* (1880), 44 Mich. 359, 6 N. W. 843. "The failure of a public official to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance." *Gage v. Springer* (1904), 211 Ill. 200, 71 N. E. 860, 103 Am. St. 191.

Respecting a public official in his relation to those requirements of his office that pertain to the public rather than to the individual, it is said that "His position is strictly analogous to that of a private agent, who, for failing to execute the duties of his agency is not answerable to any one but his principal. Such an officer is the agent of the State, or of the municipality; and for failing to execute the duties which the State, or the municipality,

requires of him, he is not answerable directly to any citizen, however much the latter may be damaged by his *nonfeasance*. * * * Take, again, the case of an overseer of highways. From his mere neglect to discharge his duty, and keep the highways in repair, a traveler may suffer grievous damage, yet it has been frequently decided in England and in this country that the traveler thus injured cannot maintain an action against him", for the reason that he is an officer of the public and not of the traveler. 5 Thompson, Negligence (2d ed.) §6392. Judge Thompson, in the above section, avails himself of an illustration from Cooley, Torts, to the effect that where a policeman goes to sleep on his beat, and a robbery is committed which would not have occurred had the policeman been attending to his duty, while the municipality whose officer the policeman is, may punish him in any appropriate manner, the person robbed cannot maintain an action against him based on the loss incurred by the robbery, for the reason that the duty of the officer to be vigilant and attentive is a duty owing to the municipality, rather than to the individual.

On the subject of whether the duty of road officials to repair public highways is a duty owing to the public or to individuals, and consequently to whom such officials are answerable for a failure to perform such duty, Judge Thompson, in reviewing the conflict in decisions, states his deduction as follows: "Overseers of highways act directly for the public, and not distributively for individuals, and, upon the principles above announced, are not answerable, for mere neglect or nonfeasance in the execution of their office, to individuals damaged thereby." 5 Thompson, Negligence (2d ed.) §6397 *et seq.* Also as follows: "But the general doctrine is that these road officers are not personally liable in damages to travelers who may be injured in consequence of the defective condition of highways or bridges in their charge, for the reason that their neglect is regarded

as *nonfeasance merely*,—that is to say, a failure of duty toward the town, or county, or the municipal corporation, and not a failure of duty towards the particular individuals distributively." 5 Thompson, Negligence §6401. See also 2 Elliott, Roads and Sts. (3d ed.) §857, *et seq.* The rule is thus stated in 2 Shearman & Redfield, Negligence (6th ed.) §340a: "Whether such officers are to be deemed agents of the city in its corporate capacity, or public officers in law, in neither cases, if the act complained of is one of nonfeasance only can it be made the basis of a private action; yet the general rule may be said to be that if such act is one of misfeasance and directly injures the plaintiff he is entitled to maintain his action against them individually for injury wrongfully inflicted."

In an action brought to recover damages for the death of a person caused by the defective condition of an approach to a bridge over a watercourse, the Supreme Court used the following language: "It is a well settled proposition that when subdivisions of a State are organized solely for a public purpose by a general law, no action lies against them for an injury received by any one on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute; that such subdivisions, as counties and townships, are instrumentalities of government and exercise authority given by the State, and are no more liable for the acts or omissions of their officers than the State." *Board, etc. v. Allman, supra*, 576. To the same effect is *Cones v. Board, etc.* (1894), 137 Ind. 404, 37 N. E. 272, involving a case where a person suffered an injury by reason of the defective condition of a public highway. As indicated in the Allman case, the decision is based on the "broad ground that counties, being subdivisions of the State, are instrumentalities of government and exercise authority given by the State." All the reasons that may be given why counties and townships should be exempted from liability in matters under consideration do

not apply to road supervisors and township trustees. It may be said of such officials, however, that they are chosen pursuant to authority granted by the State, and that they must be numbered among the agencies or instrumentalities by which the State performs its work of repairing roads and bridges, and that in performing such work they are discharging a duty owing to the State.

In *McConnel v. Dewey* (1877), 5 Neb. 385, under circumstances very similar to those presented here, it is held that liability against a road supervisor in his personal capacity does not exist. The decision is grounded on the fact that such official exercises duties of a general public nature and for the public at large; that the legislature, having charged such official with certain duties in the repair of roads, and fixed a penalty for their nonperformance, it will not be presumed, in the absence of legislative enactment, that the legislature intended an additional remedy for the benefit of individuals. There is a like holding in *Nagle v. Wakey* (1896), 161 Ill. 387, 43 N. E. 1079, involving township commissioners of highways, the decision being based on the additional grounds that such officers are liable to a penalty for a refusal to serve if elected, and that as a consequence, their situation is similar to that of townships and counties, in that their duties are imposed on them without their consent, and that such duties are exclusively for public purposes. To the same effect is *Worden v. Witt* (1895), 4 Idaho 404, 39 Pac. 1114, 95 Am. St. 70, involving county commissioners, the decision being based on the public nature of the duties performed by such officer in repairing highways and bridges. It is there said, in substance, that had there been any intention on the part of the legislature to impose such a liability on such officials, it would have been so declared by enactment. See, also, *Robinson v. Rohr* (1889), 73 Wis. 436, 40 N. W. 668, 9 Am. St. 810, 2 L. R. A. 366.

In each of the cases *Dunlap v. Knapp* (1863), 14 Ohio

St. 64, 82 Am. Dec. 468, and *Lynn v. Adams* (1850), 2 Ind. 143, under circumstances very similar to those presented by the case at bar, it is held, after an examination and analysis of the decisions, both American and English, that a road supervisor is not personally liable to an individual for damages resulting from his mere neglect to repair a bridge. All the reasons given in support of the decision in those cases are perhaps not applicable here, but nevertheless, they tend strongly to support the conclusion of the trial court in this case.

From early in the history of state government in Indiana, it has been the policy of the State, through its legislative department to delegate to political subdivisions the duty of repairing public roads and bridges in certain cases. Provision has been made also for selecting certain local officers, through whom such delegated duty should be performed. The tasks required of these officials have from time to time become more onerous, and provision has been made for the infliction of penalties in the nature of fines or otherwise for the failure to discharge such delegated duties. Among such local officers are road supervisors and township trustees, who are subject to punishment, as we have indicated, for a failure to perform their respective duties. There has at no time in the history of the State been any statutory provision creating the sort of liability sought to be established and enforced in this action, and we know of no decision by any court of appellate jurisdiction in this State, that such a liability may be established or enforced. Considering the manifold burdens of their respective offices, these officials are poorly paid. If they should be subjected to a liability to respond in damages under circumstances presented here it is doubtful whether competent and responsible persons could be induced to assume the burdens imposed. If liable in this action, no reason occurs to us why they would not be liable under like circumstances when the way involved is a public high-

way proper rather than a bridge as a part thereof within their respective jurisdiction. Doubtless as population increases, business expands and the necessity for more frequent, rapid and safe travel over public ways becomes more urgent, sound public policy may require that as a step in keeping such ways in a condition of repair commensurate with the needs, a liability such as is sought to be imposed here may be created. The legislature should determine when we have reached such state of development, and should provide accordingly.

We hold that whatever obligation rested on appellees as officials to repair the bridge in question was in the nature of a duty owing to the State or public at large, rather than to individuals distributively, and that appellees in their personal capacity are not liable to appellant for the mere failure to perform such duty by repairing the bridge, and that as a consequence the judgment should be affirmed. The negligent performance of an official duty by a road supervisor or township trustee to the damage of an individual is not included within the scope of this decision. Judgment affirmed.

NOTE.—Reported in 109 N. E. 938. As to liability of highway officers for injuries occasioned by their neglect of duty, see 83 Am. Dec. 563. See, also, under (1) 5 Cyc. 1095; (2) 37 Cyc. 216; (3) 37 Cyc 238; (4) 5 Cyc. 1078; (5) 5 Cyc. 1088.

DAEGLING ET AL. v. STRAUSS ET AL.

[No. 9,277. Filed October 27, 1915.]

1. *APPEAL.—Finality of Judgment.—Review.*—In an action to quiet title and for possession of real estate where the special findings and conclusions of law covered all the issues between the parties, but the record discloses no judgment against appellants as to the interest which the court found to be held by one who was a defendant to appellant's cross-complaint, the issue as to such defendant was not adjudicated, and hence the judgment was not a final judgment from which an appeal would lie. p. 676.

Daegling v. Strauss—59 Ind. App. 672.

2. **JUDGMENT.**—*Final Judgment.*—A final judgment is one that at once disposes of all the issues, as to all the parties involved in the controversy presented by the pleadings, to the full extent of the power of the court to dispose of same, and puts an end to the particular case as to all of such parties and all of such issues. p. 676.

From Lake Circuit Court; Wm. J. Whinery, Special Judge.

Action by Maurice T. Strauss and others against Frank Zawadski and others. From the judgment rendered, Fernando W. Daegling and another appeal. *Appeal dismissed.*

Bomberger, Curtis, Starr & Peters and *F. L. Weisheimer*, for appellants.

Frank B. Pattee and *Fred B. Smith*, for appellees.

FELT, J.—The appellees, other than Simon Kalish, move the court to dismiss this appeal, and in substance allege: (1) that the court has acquired no jurisdiction of the appeal to decide the merits of the case because “there is no final judgment against the defendants to the cross-complaint, Sarah Strauss, Mark Hershberg, Flora Strauss, Morris Alexander, Belle Strauss, Simon Kalish, ——— Kalish, his wife * * * May Kalish, wife of Otto Kalish and Marie Kalish; (2) because the above named persons are parties to the judgment adverse to the appellants, being defendants to appellants’ cross-complaint and as such being interested in having the judgment in favor of appellees and against appellants stand. They are necessary parties to the assignment of errors but are not named as parties thereto.”

The case was tried on an amended complaint to quiet title, and for possession of real estate, filed by Maurice T. Strauss, Bertha Hershberg, Minnie Blum, Abraham Strauss, Bertha Alexander, Isaac Strauss, Sidney Blum, Jessie Blum, Amanda Vehon, Morris Kalish, Sigmund Kalish, David C. Blum, Otto Kalish and Joseph Regenstein, against Frank Zawadski, Mrs. Frank Zawadski, whose given name is unknown, Fernando W. Daegling, Laura Daegling, his wife

and Frank Moynan, as trustee. The averments of the amended complaint show the plaintiffs to own $\frac{728}{780}$ part of the real estate therein described. The appellants filed a cross-complaint against the plaintiffs and Sarah Strauss, Mark Hershberg, Flora Strauss, Morris Alexander, Belle Strauss, Simon Kalish, ——— Kalish, his wife, May Kalish, wife of Otto Kalish and Marie Kalish, in which they alleged that they were husband and wife and the owners as tenants by entirety of all the real estate described in plaintiffs' complaint, and asked that their title be quieted as against all said parties. The plaintiffs in the original complaint and David C. Blum and Otto Kalish, answered the cross-complaint by general denial and the other defendants were defaulted.

The case was tried by the court which, on due request, made a special finding of facts and stated its conclusions of law thereon. The court found that each of the plaintiffs was the owner of a certain undivided fractional part of said real estate which is definitely set out in the finding, and that Simon Kalish, defendant to the cross-complaint, was the owner of $\frac{54}{780}$ part thereof, which fractional parts together comprised all of the real estate in controversy. On the facts so found the court stated its conclusions of law in substance that (1) the plaintiffs and the defendant, Simon Kalish, are the owners of the real estate described in the complaint, as tenants in common, setting out each fractional interest; (2) "That the plaintiffs are entitled to a decree quieting their title to said real estate against the defendants Fernando W. Daegling and Laura W. Daegling, his wife, Frank Zawadski, Mrs. Frank Zawadski his wife, * * * and Frank Moynan, as trustee * * *. That the plaintiffs are entitled to the possession of the real estate as against the defendants Daegling and Daegling and Zawadski and Zawadski"; (3) "That the defendants Daegling and Daegling should take nothing by their cross-complaint"; (4) "That the plaintiffs take nothing by their complaint

herein against the defendant, Simon Kalish." Thereupon the court rendered judgment as follows: "That the plaintiffs are the owners in fee simple and entitled to the possession of the real estate described in said special findings of fact in plaintiffs' complaint herein described, subject however, to the rights of said Daegling and Daegling and said Zawadski and Zawadski and said Moynan as trustee, as occupying claimants of said described real estate; that the defendants have not, nor has any of them any right, title, interest or claim in or to said described real estate or any part thereof, except the said right of said defendants Daegling and Daegling as occupying claimants thereof, and such rights as the defendants Zawadski and Zawadski and the defendant Moynan, as trustee may have through said defendants Daegling and Daegling as such occupying claimants; that the plaintiffs' title to said real estate be and the same is hereby forever quieted and set at rest in them, subject to the rights aforesaid. It is further ordered, adjudged and decreed by the Court that the plaintiffs do have and recover of and from the defendants Daegling and Daegling and Zawadski and Zawadski the immediate possession of the real estate described in the findings herein, and that a writ of ejectment may at the direction of the plaintiffs herein be issued by the Clerk of this Court to the Sheriff of Lake County, Indiana, to put said plaintiffs into possession of said real estate."

The appellants have named as appellees, Maurice T. Strauss, Bertha Hershberg, Minnie Blum, Abraham Strauss, Bertha Alexander, Isaac Strauss, David C. Blum, Sidney Blum, Jesse Blum, Joseph Regenstein, Amanda Vehon, Morris Kalish, Otto Kalish, Sigmund Kalish, and Simon Kalish, but have not named therein the parties set out in appellees' motion to dismiss, except Simon Kalish.

The judgment quiets the title of the plaintiffs to the action, but makes no adjudication of the title of Simon Kalish. In their cross-complaint appellants claim to own all

the real estate in controversy, and, while the finding

1. of facts and conclusions of law are against them on the proposition, there is no judgment against appellants as to the interest in the real estate which the court's finding shows is owned by Simon Kalish. The language in the court's finding indicates that Simon Kalish was treated as a defendant to the original suit and one of the conclusions of law is that "the plaintiffs take nothing by their complaint herein against the defendant, Simon Kalish", but the record shows he was not a party to the amended complaint, but was a defendant to the cross-complaint.

The appellants are seeking relief from a judgment which only adjudicates a portion of the title to the real estate in controversy and which is not binding against them as to the interest of Simon Kalish. Had the judgment been rendered against appellants on the cross-complaint in conformity with the finding of facts and conclusions of law, it would have covered all the issues as to all the parties, including Simon Kalish, but as it is, this issue is not adjudicated.

A final judgment is one that at once disposes of all the issues, as to all parties involved in the controversy presented by the pleadings, to the full extent of the

2. power of the court to dispose of the same, and puts an end to the particular case as to all of such parties and all of such issues. *Wehmeier v. Mercantile Banking Co.* (1912), 49 Ind. App. 454, 456, 97 N. E. 558, and cases cited; *Smith v. Graves* (1915), ante 55, 108 N. E. 168; *Crow v. Evans* (1912), 178 Ind. 661, 662, 100 N. E. 8; 2 R. C. L. 42; 3 C. J. 446, 447, 448, 492. Section 577 Burns 1914, §551 R. S. 1881, provides that where the trial is by the court and a request for a special finding of facts has been duly made, "the court shall first state the facts in

1. writing, and then the conclusions of law upon them, and judgment shall be rendered accordingly." The court found the facts and stated its conclusions of law as

to all the issues and all the parties, but no judgment was rendered against appellants on the conclusion of law in favor of Simon Kalish, and that appellants take nothing by their cross-complaint. The statute clearly designates three steps in such trials, viz., the finding of facts, the conclusions of law, and the judgment. The judgment from which the appeal was taken, therefore does not dispose of all the issues as to all the parties to the full extent of the power of the court so to do, and is not final within the meaning of §671 Burns 1914, §632 R. S. 1881, authorizing appeals, as interpreted by a long line of decisions by both our courts of last resort.

In *Keller v. Jordan* (1897), 147 Ind. 113, 46 N. E. 343, our Supreme Court quoted with approval the language of Elliott, App. Proc. §91 where it is said: "The fundamental principle is that the case, in all its parts, must be disposed of in so far as it is before the court, under the issues, otherwise it will not be regarded as one in which an appeal will lie."

The law does not favor the decision of legal controversies by piecemeal, and our lawmakers in enacting the statute wisely invoked the same principle. Our conclusion upon this subject makes it unnecessary for us to pass upon the other grounds for dismissal alleged in appellee's motion.

The interest of Simon Kalish in the real estate was in issue and was passed upon by the court up to the point of the rendition of the judgment where it was entirely omitted. Whether he be regarded as a party to the amended complaint, or only a defendant to the cross-complaint, as shown by the record, can not change the fact that the judgment from which the appeal was taken is not complete and final as to all the parties and all the issues of the case tried by the court. While it is always to be regretted when the court is compelled to dispose of an appeal on technical grounds, yet, in this instance, the hardship is minimized as there appears no good reason why there may not yet be

Johnson v. Sidey—59 Ind. App. 678.

a final judgment rendered in the case since the finding of facts and conclusions of law cover all the issues tried by the court.

We therefore conclude that the judgment from which the appeal was taken is not final and appealable within the meaning of our statute, and that the motion to dismiss should be sustained. Appeal dismissed.

NOTE.—Reported in 109 N. E. 920. See, also, under (1) 3 C. J. 446, 462; 2 Cyc. 586, 588; (2) 3 C. J. 441; 2 Cyc. 587, 588.

JOHNSON v. SIDEY.

[No. 8,660. Filed October 27, 1915.]

1. **PROPERTY.—Real or Personal.—Oil and Gas Leases.—Nature of Lessee's Rights.**—An oil and gas lease granting to lessee all the oil in and under the described land, with the exclusive right to enter at all times for the purpose of drilling and operating for oil or gas, etc., and providing that the grant should be void in case no well was completed within sixty days, unless a specified rental were paid for each six months of delay; that if the first well were a paying well a second should be drilled within sixty days from the completion of the first, and that all additional wells were to be drilled as the first two wells, etc., and granting to the lessee the right to remove his property at any time, though in the first instance amounting merely to a grant of the right to explore, when coupled with the fact that wells were located thereon pursuant to its terms, and in operation, ripened into a conveyance or grant of an interest in land, and such wells, together with the machinery, etc., attached, were real estate, and hence not subject to sale as personal property for nonpayment of taxes. p. 680.
2. **TAXATION.—Tax Sales.—Rights of Purchaser.**—Real estate delinquent for taxes must be sold in the manner prescribed by statute, or the purchaser can acquire no title thereto, but merely the right to the lien to which the State had. p. 682.
3. **TAXATION.—Tax Sales.—Rights of Purchaser.**—A tax sale of personal property must be pursuant to the statutory provisions therefor or it is illegal and void and the purchaser acquires no title to the property sold. p. 682.

From Wells Circuit Court; *David F. Smith*, Special Judge.

Johnson v. Sidey—59 Ind. App. 678.

Action by Frank M. Johnson against Roland J. Sidey. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Abram Simmons and *Frank C. Dailey*, for appellant.

E. C. Vaughn, for appellee.

IBACH, P. J.—In the year 1898 the owners of certain lands in Wells County, Indiana, executed a lease on the same to Denton W. Spaulding and Albert F. Spaulding for gas and oil purposes. Through a subsequent assignment appellant acquired the interests of the Spauldings in the leased premises, and when the assignment was made, a number of producing oil and gas wells were transferred to him. Later, the county treasurer, sold six of the wells, together with their equipment to satisfy certain taxes claimed to have become delinquent, together with costs and charges. Appellee was the purchaser of the property sold, and made claim of ownership of the same. Appellant brought this suit to quiet his title to the property involved in the sale. The answer was in two paragraphs, the first a general denial, the second an affirmative paragraph. There was also a cross-complaint in two paragraphs to quiet title. In each of these pleadings filed by the defendant, it is averred, among other things which are not material in view of our disposition of the case, that the county treasurer offered for sale and sold upon the land where situate "six oil wells located in the southeast corner of the southwest quarter of the land described in the lease, together with the drive pipe, casing, tubing, rods and pumping jacks connected with said six wells." Trial by the court and judgment for appellee, quieting his title to the property.

The errors assigned call in question the action of the court in overruling appellant's demurrer to appellee's second paragraph of answer to the complaint, appellant's separate demurrers to each paragraph of appellee's cross-complaint, and appellant's motion for new trial.

Appellant's first contention is that oil wells such as are involved here are real estate, and each paragraph of the cross-complaint, as well as the second paragraph of

1. the answer shows that the real estate was sold in July on the premises where located, and not in February at the courthouse door, and therefore none of these pleadings was sufficient to withstand demurrer. It is averred by appellee that the wells and equipment attached thereto formed a part of the property described in plaintiff's complaint, and in the complaint it is averred that the wells "are producing oil and gas". In passing upon the sufficiency of these pleadings, it is also necessary to take into consideration the nature of the grant given to appellant and his predecessors by the owner of the land. This contract provides, "In consideration of the sum of one dollar, receipt of which is acknowledged, the lessees are granted all the oil in and under the described land, with the exclusive right to enter thereon at all times for the purpose of drilling and operating for oil and gas," etc. In case no well is completed within sixty days from date of the contract, then the grant became null and void, unless the lessee or his assignees paid to the lessor one dollar per acre for each six months such completion is delayed. If the first well was a paying well, a second well was to be drilled within sixty days from the completion of the first well, and all additional wells were to be drilled as the first two wells, until all are drilled on the leased premises, allowing fifteen acres of land to each well. The lessee also was granted the right to remove his property at any time.

As to the legal force and effect of this contract, there can, we believe, be no doubt when there is coupled with its terms the fact that the wells located thereon became and were at the time of the sale by the county treasurer producing wells. The contract conveyed an interest in land, and the court erred in overruling the separate demurrers heretofore mentioned for the reason that the particular wells

Johnson v. Sidey—59 Ind. App. 678.

under the facts of this case, the wells sold with the machinery attached, must be considered real estate and not personal property, and the pleadings show that they were sold as personal property.

While it is true that the identical question has not been squarely decided in a case of the character of the one under consideration, enough has been said by the courts of this State, as well as by others, wherein kindred questions have been involved, to justify the announcement of the foregoing principle. This court in the consideration of a case involving an agreement in many respects similar to the one here involved, used this expression, "This much can certainly be said: that the shaft drilled in appellee's land from the surface to the gas-bearing rock was a part of the realty." *Ohio Oil Co. v. Griest* (1902), 30 Ind. App. 84, 65 N. E. 534. See, also, *Shenk v. Stahl* (1905), 35 Ind. App. 493, 498, 74 N. E. 538. It will be observed, however, in these decisions, that the court is considering a part of a well which is producing oil or gas. See, also, *Heller v. Dailey* (1902), 28 Ind. App. 555, 560, 572, 63 N. E. 490; *Graciosa Oil Co. v. County of Santa Barbara* (1909), 155 Cal. 140, 146, 99 Pac. 483, 20 L. R. A. (N. S.) 211. We are mindful of the fact that courts have held repeatedly that there is a distinction between gas and oil leases and the usual and ordinary leases for other purposes, and while such leases in the first instance grant to the lessee merely the right to explore for oil and gas, the mere fact that a hole was dug in the earth to which pipes and machinery were attached would not change the character of all such property to that of real estate, but as is said by Mr. Thornton, "The usual so-called lease or option usually gives the person taking it the right to explore on the land for oil or gas or both; and until he finds either one or the other, he has no interest in the land. * * * If the lessee find oil or gas then his so-called lease has ripened into an interest in the land." Thornton, *Oil and Gas* (2d ed.) §332a.

If we were disposed to hold, however, that the property involved in the present case was personal property, still we would be required to reverse the case for the many

2. irregularities which appear in the sale. Real estate delinquent for taxes must be sold in the manner prescribed by statute, or the purchaser acquires no
3. title thereto; where such sale is irregular, he merely acquires the right to the lien which the State had on such land. Likewise a tax sale of personal property must be conducted in accord with the provisions of the statutes relative thereto, or the sale will be illegal and void and the purchaser will acquire no title to the property illegally sold. In this case, if the property were personalty, we do not believe a legal levy was made, the notice of the sale was not in proper form, no definite or specific property was sold, and it is quite apparent that the amount for the recovery of which the sale was held exceeded the amount the treasurer was authorized to recover. We conclude, therefore, that for the error in overruling appellant's separate demurrers to appellee's second paragraph of answer to the complaint and to appellee's first and second paragraphs of cross-complaint, the cause should be reversed. Judgment reversed.

NOTE.—Reported in 109 N. E. 934. As to who may purchase at tax sale and enforce title, see 15 Am. Dec. 684; 75 Am. St. 229. On the nature of interest in oil and gas lease, see 25 L. R. A. 226; 42 L. R. A. (N. S.) 472. Petroleum and natural gas as minerals, see 20 Ann. Cas. 937; Ann. Cas. 1913 B 1214. See, also, under (1) 27 Cyc. 722, 724; (2) 37 Cyc. 1334; (3) 37 Cyc. 1239.

VINCENNES TRACTION COMPANY ET AL. v. CURRY,
ADMINISTRATOR.

[No. 8,513. Filed June 2, 1915. Rehearing denied October 28, 1915.]

1. *APPEAL.—Waiver of Error.—Briefs.*—An assignment of error is waived by appellants' failure to present the question in the points and authorities set out in its brief. p. 687.
2. *APPEAL.—Review.—Findings.—Conclusiveness.*—The court on appeal will not disturb the finding of the lower court if there is some evidence to sustain it. p. 689.
3. *STREET CARS.—Crossing Steam Road.—Care Required.*—A street car company operating cars on a track which crosses the track of a steam railroad is charged with care proportionate to the danger at the point of crossing. p. 690.
4. *CARRIERS.—Injuries to Passengers.—Collision.—Negligence of Steam Road.*—Where a street car company, whose track crossed at grade over the track of a steam railroad, was guilty of negligence which was the proximate cause of the death of a passenger in a collision of its street car with a train on the steam road, it can not avoid liability because of concurrent negligence on the part of the railroad company. p. 690.
5. *STREET RAILROADS.—Crossing Steam Road.—Care Required.*—The same character and degree of care to avoid a collision must be exercised by those operating an electric car in approaching and going over a steam railroad crossing as is required to be exercised by one driving or operating an ordinary vehicle along and over such crossing. p. 690.
6. *CARRIERS.—Injuries to Passengers.—Collision of Street Car With Train.—Concurrent Negligence.—Liability.*—Where a passenger on a street car is injured in a collision with a train, caused by the concurrent negligence of the railroad and street car companies, he may recover from either or both, and neither can interpose the defense that prior or concurrent negligence of another contributed to the injury. p. 691.
7. *STREET RAILROADS.—Crossings Over Steam Roads.—Relative Duties.*—In the absence of statutory regulation there is a difference between the duties required of the servants of a steam railroad and those of a street railroad in approaching a crossing where the view is obstructed, in that the circumstances and conditions may require that the street railway employe shall stop the car before going on the crossing, and, if necessary, go forward to a place where he can determine if it is safe to proceed, by looking and listening for an approaching train, while under the same cir-

cumstances and conditions the employes of the steam railroad are not required to stop the train, but are only required to look and listen, to give proper signals, and to use the care commensurate with the danger. p. 601.

8. CARRIERS.—*Injuries to Passengers.—Collision.—Negligence of Steam Road.—Liability.*—Where the negligence of a railroad company is the sole cause of the death of a street car passenger in a collision of the street car with one of its trains, there can be no recovery against the street car company. p. 601.
9. CARRIERS.—*Duty to Passengers.—Street Railroads.*—The rule which requires a carrier to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its road, applies to street railroads. p. 692.
10. CARRIERS.—*Injury to Passengers.—Negligence.—Jury Question.* In an action for the death of a street car passenger in collision of the street car with the train of a railroad company, where the evidence as to the manner in which both the street car and the train approached the crossing, and as to conditions surrounding the crossing, etc., was such as to be reasonably susceptible to different conclusions and inferences on the question of negligence on the part of the street car company, the question of whether it was negligent was for the jury and its finding thereon is conclusive. p. 692.
11. CARRIERS.—*Injuries to Passengers.—Collision.—Crossing Railroad Track.—Negligence.—Contributory Negligence.*—Evidence showing that the motorman and conductor in charge of a street car did not stop the car and look and listen for an approaching train before attempting to cross a railroad track, when measured by the well-settled rules of law, was sufficient to convict them of negligence proximately contributing to the death of a passenger in the street car at the time of the resulting collision, and, in view of a finding to the contrary, it can not be said that decedent was guilty of contributory negligence in attempting to alight from the car after he discovered the danger. p. 692.
12. DEATH.—*Pecuniary Loss.—Evidence.—Sufficiency.*—Where the evidence showed that decedent, an unmarried man of twenty-three years, had since the time of his employment contributed to the support of his father and mother the sum of \$5 per week, and during the last two years of his life the sum of \$10 per week, that he was not at home excepting on Saturdays and Sundays and would occasionally be away for two or three weeks without returning home at all, and that he had a life expectancy of 39.31 years, while the life expectancy of his father and mother was 19.68 and 24.46 years respectively, the finding of the court that the parents had suffered a pecuniary loss by reason of the son's death was not unwarranted. p. 692.

Vincennes Traction Co. v. Curry—59 Ind. App. 683.

13. **DEATH.—Damages.—Excessive Verdict.**—A verdict of \$1,500 in an action for the benefit of the parents as the next of kin of decedent was not excessive in view of evidence showing that decedent contributed \$10 per week to the support of his parents, that he was not at home excepting on Saturdays and Sundays and occasionally was not at home on some of those days, and that he was a young man twenty-three years of age with a life expectancy of 39.31 years, while that of his father and mother was 19.68 and 24.46 years respectively, and in the absence of anything to show that the amount of the verdict was influenced by prejudice, passion or corruption. p. 692.

From Daviess Circuit Court; *James W. Ogdon*, Judge.

Action by William C. Curry, administrator of the estate of Burtis A. Curry, deceased, against the Vincennes Traction Company and another. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

James W. Emison, Ewing Emison, M. S. Hastings, E. E. Hastings, J. G. Allen, A. W. Allen, W. R. Gardiner, C. G. Gardiner and C. K. Tharp, for appellants.

John Wilhelm, S. G. Davenport, A. J. Padgett and Alvin Padgett, for appellee.

SHEA, C. J.—Appellee, as administrator of the estate of Burtis A. Curry, deceased, brought this action against appellants to recover damages for the alleged negligent killing of his decedent while the latter was a passenger on one of appellants' street cars in the city of Vincennes, Indiana. It appears, in substance, from the first paragraph of amended complaint, that appellant, Vincennes Traction Company since January 1, 1910, has owned and operated a street railway in the city of Vincennes, Indiana, and appellant Vincennes Traction and Light Company owned and operated said railway from August 7, 1909, to January 1, 1910; that the track of said railway crossed at grade on Second Street in the city of Vincennes a track of the Evansville and Terre Haute Railroad Company, a steam railroad. On August 7, 1909, about 10 p.m. decedent was a passenger on one of the cars then owned and operated by the Vin-

cennes Traction and Light Company and, as said street car approached the steam railroad crossing, a train of refrigerator cars with two men with lighted lanterns thereon was being pushed by a steam locomotive on said railroad track toward the crossing, and the street car and train of cars approached the crossing at the same time; that as the street car approached the crossing, and while yet a safe distance of fifteen or twenty feet therefrom, the train of cars on the railroad track was only thirty or forty feet therefrom, moving at a speed of four or five miles an hour, and could have been seen and heard by the motorman and conductor, employes of appellant in charge of the street car, had they looked and listened or exercised due diligence before going upon the crossing; that the motorman and conductor carelessly and negligently ran the street car toward and on said crossing, when the train of cars was approaching the crossing and only twenty feet distant therefrom, at a speed of four or five miles an hour, without stopping the street car at a safe distance from the crossing, and waiting for the train of cars to pass over same, and negligently and carelessly failed and neglected to look and listen and ascertain before running the street car on the crossing whether any train was approaching on the railroad track near enough to endanger the safe passage of the street car over the crossing; that immediately before the train of cars struck said street car and while said street car was on the crossing, decedent saw the train of cars approaching so close and at such a rate of speed that a collision was imminent and, in trying to save and protect himself from death or serious injury, quickly got off the car at the side opposite the one toward which the train was approaching, and the only one open for passengers to enter and leave the car, and attempted to flee from the threatened danger, but as he did so, and before he could get away, the street car was, while on the crossing, struck by the train of cars, pushed and knocked off the track and

turned over on decedent, causing his death; that decedent was twenty-three years old, and this action is brought for the benefit of his father and mother to whose support he contributed. Appellant Vincennes Traction Company is made a party to the action by reason of the fact that after the death of appellee's decedent, and before this action had been brought, the Vincennes Traction and Light Company conveyed all its property, franchises and holdings to the Vincennes Traction Company, thereby leaving the former without any property against which a judgment could be enforced, and it is sought to follow the property then and now in the hands of the Vincennes Traction Company. The second paragraph is the same as the first, except that it is alleged that decedent was still on the car when it was struck, and was thrown out on the ground, and the car thrown on top of him, thereby causing his death.

The court overruled demurrers addressed to each paragraph of the complaint. An answer in general denial formed the issues tried by the court without the intervention of a jury, resulting in a finding and judgment for appellee.

The errors assigned are the overruling of appellants' demurrer to each paragraph of complaint and overruling the motion for a new trial. Appellants present no ques-

1. tion as to the sufficiency of the complaint in the points and authorities, so that assignment of error is waived. It is properly presented and argued in appellants' behalf that the court erred in overruling the motion for a new trial for the following reasons: (1) that the decision and finding of the court are not sustained by sufficient evidence; (2) that the damages assessed by the court are excessive.

The evidence discloses that the street railway was owned and operated at the time of the accident by appellant Vincennes Traction and Light Company. Subsequently, and before the trial of the cause, it was acquired by appellant

Vincennes Traction Company. Its tracks crossed a switch track of the Evansville and Terre Haute Railroad Company, a steam railroad, at grade in Second Street in the city of Vincennes, Indiana; that the switch track extends from the main track through a narrow alley into said Second Street, at the crossing; that at the time of the accident a street car, on which decedent was a passenger, was approaching the crossing from the north. At the same time, on the switch track, there was approaching the crossing from the west an engine, backing seven or eight refrigerator freight cars toward the crossing. On the car nearest the crossing were two employes of the steam railroad company with lanterns. The accident occurred about 10 o'clock at night. There were no lights on the crossing, and the moon was not shining. There was a passing switch upon the street railway lines about fifty feet from the crossing, at which point the car which came into collision with the steam railroad cars passed another street car going in the opposite direction. The evidence is conflicting as to whether the street car stopped upon the switch. The evidence is also conflicting as to whether the street car stopped at all as it approached the crossing. All witnesses except appellants' employe state the car did not stop. The speed at which the street car was moving was from two to four miles per hour. The speed at which the steam cars were moving was from about eight to twelve miles per hour. In approaching the crossing on the steam railroad, there was a sharp curve, in passing over which the wheels of the cars made a loud grinding noise by their pressure against the rails, which, it is stated, could be heard from one-quarter to one-half mile. The employes of the steam railroad on top of the train, when they were a distance of from forty to eighty feet, saw the street car approaching, realized the danger of collision with the street car, and made an effort to attract the attention of the motorman and conductor of the street car by waving their lanterns and hallooing in

a very loud tone of voice, which was heard by many people in the neighborhood, on the streets and in the houses. Because of the obstructions to the view in approaching the crossing, due to the narrow alley in which the track of the steam railroad was laid, and the houses upon either side, it was regarded as a very dangerous place. The motorman and conductor were familiar with all the surroundings, and crossed over it twice each hour during the day when they were at work. There is evidence that the motorman and conductor could have seen the train on the steam railroad track approaching when the street car was from twenty to forty feet from the track, and the cars on the switch track were sixty to a hundred feet distant. The motorman testifies that he did not see the approaching train on the steam track until he was very near to, or on the crossing, and the cars on the steam railroad track were about twelve feet distant. No explanation is given for the failure to see the signals given by the trainmen with lanterns or the approaching train sooner. Neither is there any explanation of their failure to hear the noise made by the train in passing around the curve, nor the noise made by the train employes, which attracted the attention of passersby, as well as residents in the neighborhood.

Upon the facts thus stated, appellants insist that there is no evidence upon which the court could rest the finding and judgment. The rule has been repeatedly an-

2. nounced that this court will not disturb the finding of the lower court where there is some evidence to sustain it. *Evansville Gas, etc., Co. v. Robertson* (1914), 55 Ind. App. 353, 100 N. E. 689; *Keys v. McDowell* (1913), 54 Ind. App. 263, 100 N. E. 385; *Delaware, etc., Tel. Co. v. Fiske* (1907), 40 Ind. App. 348, 81 N. E. 1110. There is evidence that the street car was not stopped in approaching a dangerous crossing, and it is contended that other proper precautions were not used by appellants' employes

to discover the approach of the train upon the steam road. A statement of the law respecting the duties of appellants in such cases will aid us in reaching a conclusion.

Appellants were charged with care proportionate to the danger at the point of injury. *Prothero v. Citizens St. R. Co.* (1893), 134 Ind. 431, 439, 33 N. E. 765. Much

3. argument has been made by appellants' learned counsel in an effort to show that the employes of the steam railroad company were guilty of negli-

4. gence in approaching the crossing. We make no finding upon that question, as it is not important in view of the conclusion we have reached. If the street car company was guilty of negligence which proximately contributed to the injury, then it can not be released from liability because of the concurrent negligence of the railroad company. The following authorities sustain this principle. *Towers v. Lake Erie, etc., R. Co.* (1898), 18 Ind. App. 684, 48 N. E. 1046; *Indianapolis Traction, etc., Co. v. Romans* (1907), 40 Ind. App. 184, 79 N. E. 1068; *Pittsburgh, etc., R. Co. v. Browning* (1904), 34 Ind. App. 90, 71 N. E. 227; *Cincinnati, etc., R. Co. v. Acrea* (1907), 40 Ind. App. 150, 81 N. E. 213; *Louisville, etc., Lighting Co. v. Hynes* (1907), 47 Ind. App. 507, 515, 91 N. E. 962; *City of Logansport v. Smith* (1911), 47 Ind. App. 64, 73, 93 N. E. 883; *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 822; *Grand Rapids, etc., R. Co. v. Ellison* (1889), 117 Ind. 234, 20 N. E. 135; *San Antonio, etc., R. Co. v. Bowles* (1895), 88 Tex. 634, 32 S. W. 880; 33 Cyc.

738. The same character and degree of care to

5. avoid a collision must be exercised by those operating an electric car in approaching and going over a steam railroad crossing, as is required to be exercised by one driving or operating any ordinary vehicle along and over such crossing. 36 Cyc. 1505; *Indianapolis Union R. Co. v. Waddington* (1907), 169 Ind. 448, 82 N. E. 1030. If the concurrent negligence of two persons combined, results in in-

jury to a third person, he may recover of either or
 6. both, and neither can interpose the defense that prior or concurrent negligence of another contributed to the injury. 1 Thompson, Negligence (2d ed.) §75; *South Bend Mfg. Co. v. Liphart* (1895), 12 Ind. App. 185, 39 N. E. 908; *Indianapolis Union R. Co. v. Waddington*, *supra*.

In the absence of statutory regulations, there is an element of difference between the duties required of the servants of a steam railroad, and those of an electric street

7. railroad in approaching a crossing where the view is obstructed, such as the one we are considering. For instance, the street railway employe may be required, if the place of crossing is more than ordinarily dangerous, to stop the car before going on the crossing, and if necessary go forward to a point where he can see whether it is safe to proceed, and look and listen for an approaching train. *Pittsburgh, etc., R. Co. v. Browning*, *supra*; 3 Elliott, Railroads (2d ed.) §§1166a, 1167. The employes of steam railroads are not required in a case such as this to stop their train, and go forward and look for an approaching train, but are required to look and listen, to give proper signals, and use due care commensurate with the danger to avoid injury to persons and vehicles at the crossing. In other words, the steam train has precedence in crossing, upon giving the required signals. *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 88 N. E. 612. If the street car company had been free from fault, as appellants'

8. learned counsel very earnestly and ably argue, and the negligence of the railroad company was the sole cause of the injury, then there could be no recovery in this case. 33 Cyc. 736; *Central Passenger R. Co. v. Kuhn* (1888), 86 Ky. 578, 6 S. W. 441, 9 Am. St. 309; *Wabash R. Co. v. Barrett* (1904), 117 Ill. App. 315; *Pratt v. Chicago, etc., R. Co.* (1888), 38 Minn. 455; *Kansas City, etc., R. Co. v. Stoner* (1892), 51 Fed. 649, 2 C. C. A. 437; *Bunting v. Pennsylvania R. Co.* (1888), 118 Pa. St. 204, 12 Atl. 448.

“The rule which requires a carrier of passengers to
9. exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its road, and which is generally applied to the actual progress of the passenger on the journey undertaken, applies to street railroads.” *Louisville, etc., Traction Co. v. Walker* (1912), 177 Ind. 38, 46, 97 N. E. 151, and authorities cited. See, also, *Indianapolis Southern R. Co. v. Emmerson* (1913), 52 Ind. App. 403, 409, 98 N. E. 895. We do not find such

a state of facts presented by the evidence in this
10. case as will warrant this court in declaring as a matter of law that appellant street railway company was free from fault. The rule is well settled that where reasonable minds may differ upon the conclusions and inferences to be drawn from the evidence, then the question is one of fact for the court or jury trying the cause. Such a case is presented by the evidence here. *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 822; *Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442, 99 N. E. 1005. The conduct of appellants’ employes

11. as shown by the evidence herein set out, when measured by the well-settled rules of law, convict them of negligence which proximately contributed to the decedent’s death. We can not say that decedent was guilty of contributory negligence in attempting to alight from the car after he discovered the danger, in view of the trial court’s finding to the contrary, which is suggested, but not argued in appellants’ brief. 2 *Nellis, Street Railways* (2d ed.) §516.

The facts disclose that decedent was an unmarried man twenty-three years of age. He had been employed by Hollweg & Reese of the city of Indianapolis, Indiana, for

12. a period of four years. During that time his salary had been increased from \$6 per week, while he was engaged in the store, to \$1,000 per year, at the time
13. of his death. For a period of two years his duties were to represent his firm upon the road as a travel-

Vincennes Traction Co. v. Curry—59 Ind. App. 683.

ing salesman. During a part of the time he was so employed, he contributed to the support of his father and mother \$5 per week. During the last two years of his lifetime, he contributed to them \$10 per week. During that time he was at home only on Saturdays and Sundays, sometimes being away for two or three weeks without returning home at all. Upon this state of facts, it is argued that the amount of recovery, \$1,500, is excessive. Decedent was twenty-three years of age, with an expectancy of 39.31 years; his mother was 45 years old with an expectancy of 24.46 years, and his father 52 years, with an expectancy of 19.68 years. We have no doubt that the trial court took into consideration the fact that the next of kin might die within the period of their expectancy or that decedent might die an early natural death, or might get married, or for some other reason might discontinue his contributions to the support of his father and mother. The rule is well settled in these cases that the recovery is based upon the pecuniary loss sustained by the next of kin. If decedent had contributed to the support of his father and mother, and they had reasonable expectation of his ability and willingness to continue those contributions, then they are entitled to recover. We can not say that the trial court was not warranted in finding that pecuniary loss was sustained by the next of kin. *Chicago, etc., R. Co. v. Vester* (1911), 47 Ind. App. 141, 156, 93 N. E. 1039, and authorities cited; *Korrady v. Lake Shore, etc., R. Co.* (1892), 131 Ind. 261, 29 N. E. 1069; *Diebold v. Sharp* (1898), 19 Ind. App. 474, 49 N. E. 837. Neither can we say that the damages are excessive under the well-established rule of this court as well as the Supreme Court. We can not say the trial court was influenced by prejudice, passion, or corruption in assessing the amount of damages, and this court would not be warranted in disturbing the verdict for that reason. *Picquet v. McKay* (1831), 2 Blackf. 465; *Creamery, etc., Co. v. Hotsenpiller* (1902), 159 Ind. 99, 64 N. E. 600; *L. S. Ayres & Co. v. Harmon* (1914), 56

Ind. App. 436, 104 N. E. 315. We find no error in the record. Judgment affirmed.

NOTE.—Reported in 109 N. E. 62. On effect of concurrent negligence of third person, see 17 L. R. A. 33. As to liability of street railway for injury to passenger caused by collision at railroad crossing, see Ann. Cas. 1913 E 179. See, also, under (1) 3 Cyc. 388; (2) 3 Cyc. 360; (3) 6 Cyc. 624; 36 Cyc. 1504, 1505; (4) 6 Cyc. 624; (5, 7) 36 Cyc. 1504, 1505; (9) 6 Cyc. 595; (10) 29 Cyc. 630; (11) 36 Cyc. 1600; (12) 13 Cyc. 361; (13) 13 Cyc. 378.

ISLEY v. CITY OF ATTICA.

[No. 8,748. Filed October 29, 1915.]

1. MUNICIPAL CORPORATIONS.—*Opening Streets.—Appeal on Question of Damages.—Jurisdiction.—Dismissal.*—Where a person aggrieved by the action of a city in ordering the opening of a street through his premises, appealed to the circuit court on the question of damages, by filing an original complaint pursuant to §§8704, 8705 Burns 1914, Acts 1905 p. 219, §§101, 102, the court obtained no jurisdiction of the proceedings except on the question of benefits and damages, and therefore had no jurisdiction to dismiss the proceedings instituted before the common council. p. 696.
2. MUNICIPAL CORPORATIONS.—*Opening Streets.—Discontinuance of Proceedings.—Statutes.*—There is nothing in the provisions of §8700 *et seq.* Burns 1914, Acts 1905 p. 219, for the opening, changing or vacating of streets, to preclude the application of the general rule that a municipal corporation, that is proceeding to take private property for street or other public purposes, may discontinue the proceedings or abandon the appropriation at any time before the award of benefits and damages is finally ascertained and confirmed by the proper municipal authority, or before final adjudication where an appeal to the circuit court has been taken. p. 697.
3. MUNICIPAL CORPORATIONS.—*Opening Streets.—Appeal on Question of Damages.—Dismissal.*—An appeal on the question of benefits and damages arising from the opening of a street, taken pursuant to §§8704, 8705 Burns 1914, Acts 1905 p. 219, §§101, 102, is a special statutory proceeding, and the rule of the civil code relative to dismissals (§338 Burns 1914, §333 R. S. 1881) does not apply. p. 698.
4. MUNICIPAL CORPORATIONS.—*Opening Streets.—Appeal on Question of Damages.—Dismissal.*—There was no error in the dismissal

Isley v. City of Attica—59 Ind. App. 694.

by the circuit court of an appeal on the question of benefits and damages from the opening of a street, taken pursuant to §§8704, 8705 Burns 1914, Acts 1905 p. 219, §§101, 102, where the city's motion for dismissal disclosed that possession of the land had not been taken, and contained an offer to pay costs, since such action on the part of the city amounted to an abandonment of the proceedings. p. 699.

From Fountain Circuit Court; *I. E. Schoonover*, Judge.

Action by Jacob P. Isley against the City of Attica for review of the question of benefits and damages in a proceeding to open a street. From a judgment of dismissal, the plaintiff appeals. *Affirmed*.

Fred S. Purnell and *Lucas Nebeker*, for appellant.

Charles R. Milford, for appellee.

FELT, J.—The city council of the city of Attica, Indiana, in pursuance of the act of 1905 (§8700 *et seq.* Burns 1914, Acts 1905 p. 219 and §8959 Burns 1908 as amended by Acts 1909 p. 412, §6), ordered the opening of Brady Street in said city through a tract of real estate owned by appellant and, over his remonstrance, adjudged the benefits to his real estate equal to the damages sustained by him by the condemnation of his land.

Appellant makes no complaint as to the regularity of the proceedings but, being aggrieved by the decision of the council on the amount of damages, appealed to the Fountain Circuit Court by filing an original complaint under the provisions of §§8704, 8705 Burns 1914, Acts 1905 p. 219, §§101, 102. On trial of the case, the question of the amount of damages was submitted to a jury and on December 21, 1912, a verdict was returned in his favor for \$1,000 damages in excess of his benefits.

On December 30, 1912, at the same term of court the city of Attica moved the court to dismiss "the entire condemnation proceeding * * * commenced by the common council, and as appealed as to the question of damages." Appellant filed a motion in writing for judgment on the

verdict. The court sustained the motion to dismiss and overruled appellant's motion for judgment on the verdict, to each of which rulings appellant duly excepted. The court rendered judgment in substance that the proceedings described in appellant's complaint be dismissed at the cost of the city and that such proceedings be set aside and held for naught and that the appellant recover of and from the city his costs. The errors assigned question the correctness of the court's ruling on each of said motions.

Section 8704, *supra*, provides that any remonstrator who is aggrieved by the decision of the board or council may within twenty days take an appeal to the circuit or

1. superior court, but provides that "Such appeal shall affect only the assessment or award of the person appealing". The next section provides the manner of taking the appeal and that the "court shall rehear the matter of such assessment *de novo* and confirm, lower or increase the same as may seem just. In case such court shall reduce the amount of the benefit assessed against the land of such property holders, or increase the amount of damages awarded in his favor, the plaintiff in such suit shall recover costs, otherwise not. The judgment of such court shall be final, and no appeal shall lie therefrom." The statute authorizes no appeal from the action of the board or council in such proceedings except on the question of damages or benefits, and expressly provides that on such questions the judgment of the circuit or superior court to which the appeal is taken "shall be final, and no appeal shall lie therefrom". While the wording of the motion to dismiss and the language of the judgment may indicate an attempt to dismiss the proceedings *ab initio*, the effect of the ruling was to dismiss the complaint by which under the statute the appeal was taken. The circuit court obtained no jurisdiction of the proceedings except on the question of benefits and damages and therefore had no jurisdiction to dismiss the proceedings instituted before the common council. The proceedings to

condemn and appropriate the land for street purposes remained in the city council and the appeal in no way affected the same except on the questions of benefits and damages.

Treating the ruling as a dismissal of the appeal to the circuit court after verdict and before judgment, the assignment presents the question of the appellee's right to

2. such dismissal. In the absence of a controlling statute, the general rule is that, where a municipal corporation is proceeding to take private property for street, or other public purposes, it may discontinue the proceeding or abandon the appropriation at any time before the award of benefits and damages is finally ascertained and confirmed by the municipal board or council which has jurisdiction of the proceeding, or before final adjudication, where an appeal to a court is authorized and duly taken, subject to the payment of accrued costs and to a right of action in favor of any property owner for special damages that may have proximately resulted to his property by reason of such proceedings. 3 Dillon, Mun. Corp. (5th ed.) §§1044, 1045; 1 Elliott, Roads and Sts. §§306, 307, 308; *Brokaw v. City of Terre Haute* (1894), 97 Ind. 451, 453; *Sowers v. Cincinnati, etc., R. Co.* (1904), 162 Ind. 676, 681, 71 N. E. 134; *Louisville, etc., R. Co. v. Ryan* (1886), 64 Miss. 399, 409, 8 South. 173; *Simpson v. Kansas City* (1892), 111 Mo. 237, 242, 20 S. W. 38; *O'Neill v. Board, etc.* (1879), 41 N. J. L. 161, 172; *Moravian Seminary v. Bethlehem Borough* (1893), 153 Pa. St. 583, 588, 26 Atl. 237; *Robertson v. Hartenbower* (1903), 120 Iowa 410, 94 N. W. 857. The act of 1875 (§3180 R. S. 1881, Acts 1875 [s. s.] p. 17) authorized an appeal affecting "the regularity of the proceedings of the commissioners and the questions as to the amount of benefits or damages assessed", and provided that "such appeals shall not prevent such city from proceeding with the proposed appropriation, nor from making the proposed change or improvement". The act also provided that "If upon such appeal, the report of the commissioners as

to the benefits or damages be greatly diminished or increased, the city may, upon payment of all costs, discontinue such proceedings." The act of 1905 (§8700 *et seq.* Burns 1914, Acts 1905 p. 219) makes provision for opening, changing or vacating streets by the board of public works, or city council, and provides for "remonstrances from persons interested in or affected by such proceeding." Also that "Such board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding its original resolution, which action shall be final and conclusive on all persons." Notwithstanding the omission from the act of 1905, of the provision authorizing the city "to discontinue such proceedings" after the damages are assessed on appeal, if the benefits or damages are greatly diminished or increased, we do not think the statute of 1905 is sufficiently explicit to deny the city the benefit of the general rule which permits it to discontinue the proceedings at any time before final confirmation by the board or council, or before final judgment where an appeal has been taken. The legislature which enacted the statute in 1905, doubtless took cognizance of the general principle of law which gives a municipality the right to abandon the enterprise when in its judgment the damages assessed exceed the benefits which would accrue to the public by opening the street. The city having such right under the foregoing rule of law it was not necessary to say anything on the subject in enacting the statute. The rule prevails unless it is changed by statute. The city did not know until the return of the verdict, the amount of damages it would be required to pay, if it proceeded with the opening of the street.

This is a special statutory proceeding and the rule of the code in civil procedure does not apply. §338 Burns 1914, §333 R. S. 1881. The appeal was taken by the

3. filing of a complaint in pursuance of the statute.

When the motion to dismiss was sustained, notwith-

standing the language employed, its only effect was

4. to dismiss the appeal, which under the statute related only to the assessment of damages and benefits. In the motion to dismiss, the city showed that it had not taken possession of any part of the land to be appropriated for street purposes, and it expressly offered to pay the accrued costs. This action of the city was in effect an abandonment of the condemnation proceedings for it could not take the land without paying the amount the circuit court should finally adjudge due therefor. Under the general rule the city had the right to discontinue the proceedings to appropriate the land at any time before judgment was rendered on the verdict. The same rule gives to the property owner a right of action for special damages, if any, sustained by him on account of such proceedings. By this rule the public is protected, while the reverse of the rule would compel the city to determine finally on the appropriation of the land before it ascertained the amount of damages it would be compelled to pay. If the damages when ascertained exceed the benefit to the public, the rule permits the city to discontinue the proceedings at any time before judgment on the conditions above stated. From this, it follows that the court did not err in the rulings which are challenged by the assignment of errors. Judgment affirmed.

NOTE.—Reported in 109 N. E. 918. As to evidence of damages in eminent domain proceedings, see 22 Am. St. 49. At what stage may eminent domain proceedings be discontinued, see Ann. Cas. 1913 E 1062. See, also, under (1) 28 Cyc. 1017, 1094; (2) 28 Cyc. 1011.

AMERICAN SHEET AND TIN PLATE COMPANY v.
YONAN.

[No. 8,755. Filed October 29, 1915.]

1. *APPEAL.—Presenting Error.—Burden.*—The burden is upon appellant to show reversible error. p. 703.
2. *APPEAL.—Briefs.—Assignment of Errors.*—Under Rule 22 the court must ignore any alleged error not referred to in the points and authorities contained in appellant's brief. p. 703.
3. *APPEAL.—Briefs.—Points and Authorities.*—The mere statement of an abstract proposition of law under the heading "points and authorities" in no way addressed to, or applied to, any particular error relied on for reversal, presents no question on the overruling of a motion for new trial containing several grounds to which such propositions may apply, but if only one error is relied on all propositions will be regarded as referring thereto. p. 703.
4. *APPEAL.—Briefs.—Points and Authorities.*—Where a proposition set out in appellant's brief contained no reference to any error relied on, merely stating that the alleged contract sued on was so indefinite and uncertain that it was unenforceable, the court could assume, in view of the fact that the complaint was not challenged, that it was intended to challenge the decision of the trial court as not being sustained by sufficient evidence in that the contract offered in evidence was so vague, indefinite and ambiguous that the trial court could not have known what was intended and agreed on by the parties. p. 704.
5. *CONTRACTS.—Validity.—Evidence.*—Where there was evidence to show that both parties to the contract sued on understood what was intended by its terms, and that plaintiff had partly performed, and there was also evidence tending to show how both parties had construed the contract as affecting such part performance, the evidence was sufficient to enable the trial court to ascertain all the essential elements, terms and conditions of such contract to which the parties intended to bind themselves, and hence sufficient to support the court's decision thereon. p. 704.
6. *APPEAL.—Review.—Findings.—Conclusiveness.*—Where the evidence is conflicting on the questions of fact as to which the finding of the trial court is challenged, the finding can not be disturbed. p. 704.

From Lake Circuit Court; *Johannes Kopelke*, Judge.

Action by Joseph Yonan against the American Sheet and

American, etc., Tin Plate Co. v. Yonan—59 Ind. App. 700.

Tin Plate Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Knapp & Campbell, L. L. Bomberger and Charles P. Schwartz, for appellant.

Robert M. Davis and Oliver Starr, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in an action brought by him to recover damages for breach of contract. The overruling of appellant's motion for a new trial is the only error assigned and relied on for reversal. Hence, for the purpose of the questions presented by the appeal, it will only be necessary to indicate in a general way the scope and character of the pleadings.

The complaint is in three paragraphs, each based on a written contract which reads as follows:

"Gary, Indiana, September 12, 1911. The labor contract for painting of all the houses under construction and others to be constructed hereafter, belonging to the American Sheet and Tin Plate Company at Gary, Indiana. The American Sheet and Tin Plate Company shall furnish all the tools and materials for painting work, and they will give all the directions concerning the work to be done on their work, and J. Yonan Company to furnish all the painters arranged in three grades: 35c, 45c, and 55c per hour, the said amount at the end of each week to be paid to the said J. Yonan Company and have a foreman to look after the work and receive payment at the end of each week from the American Sheet and Tin Plate Company. Furthermore the said J. Yonan Company will maintain an open shop until the entire work is completed and see that all the work is done in a good workmanship. (Signed) American Sheet and Tin Plate Company, J. W. Grantham, Contractor. J. Yonan Company."

The first paragraph proceeds on the theory that appellee company entered upon said work on September 12, 1911, and from that time until February —, 1912, continued to work and to receive pay therefor in accordance with the terms of such contract; that on the latter date appellant, without any cause, discharged appellee company and refused to per

mit it or any of its men to continue under such contract; that it performed all conditions of such contract on its part up to the time of its discharge and that from that time on it was ready and willing to continue its contract. The second paragraph proceeds on the same theory but anticipates a defense by way of release from the terms of the contract secured from one Hosanna, a member of the partnership doing business under the firm name of J. Yonan Company, and seeks to avoid such defense on the ground that said release was unauthorized and was obtained fraudulently as against this appellee. The third paragraph proceeds on the theory that appellee company entered upon the performance of the contract on September 12, 1911, and continued to perform and receive pay thereunder until the — day of December when appellant informed appellee that it would deal with him exclusively and make all payments under said contract to him; that he was to superintend all the work contemplated by such contract and that Hosanna would not be dealt with further; that it would continue said contract with appellee in his individual capacity; that he relied on said statement and then and there dissolved said partnership with Hosanna and continued thereafter to perform all the conditions of said contract to be performed by the J. Yonan Company until the — day of February, 1912, when appellant discharged appellee and refused to permit him to continue his employment under said contract or to carry out the terms thereof. Both, the first and second paragraphs allege, that prior to the beginning of this suit, said Hosanna had ceased to be a partner of appellee; that the partnership had been dissolved; that appellee is now the sole owner of said business; and that the contract was duly assigned in writing by the said Hosanna. Each paragraph alleges damages in the sum of \$2,400.

Appellant filed an answer to the complaint, in four paragraphs; the first was a general denial; the second pleaded payment; the third, a release; and the fourth, a denial of

American, etc., Tin Plate Co. v. Yonan—59 Ind. App. 700.

the execution of contract sued on by appellee. Upon the issues thus formed, the cause was tried by the court without the intervention of a jury. The court made a general finding for appellee, that he was entitled to recover from appellant damages in the sum of \$436.27. Appellant's motion for new trial was overruled and judgment rendered on the finding.

Under the heading "Points and Authorities" appellant, in its brief, states the following: (1) the alleged contract sued on was so indefinite and uncertain that it was unenforceable; (2) the finding of the court is not supported by the evidence—there is no evidence that appellee was damaged; (3) Grantham had no authority to bind appellant; (4) the release executed by Hosanna was a complete bar to this suit. The burden is upon appellant to show

1. reversible error. *Richey v. Cleveland, etc., R. Co.* (1911), 176 Ind. 542, 96 N. E. 694, 47 L. R. A. (N. S.) 121; *State, ex rel. v. Board, etc.* (1906), 167 Ind.

2. 276, 78 N. E. 1060. Rule 22 of the court and the decisions construing it require us to ignore any alleged error not contained in appellant's statements of "Points and Authorities". *City of Huntington v. Mitten* (1911), 176 Ind. 485, 96 N. E. 467; *Stauffer v. Hulwick* (1911), 176 Ind. 410, 96 N. E. 154, Ann. Cas. 1914 A 951; *Owen v. Harriott* (1911), 47 Ind. App. 359, 94 N. E. 591; *Pittsburgh, etc., R. Co. v. Greb* (1905), 34 Ind. App. 625, 73 N. E. 620.

The mere statement of an abstract proposition of law

3. under the heading "Points and Authorities" in no way addressed to, or applied to, any particular error relied on for reversal is not such a compliance with Rule 22 as to present any question where there are several grounds in the motion for new trial to which such propositions might bear some relation. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652. Where, however, but one error is relied upon in a brief, all the propositions stated and authorities cited will be regarded as referring to such error. *Richey v. Cleveland, etc., R. Co.* (1911), 47 Ind.

App. 123, 93 N. E. 1022. It will be observed that all

4. of the propositions or points, *supra*, except the second, are general and no application is made of them to any error relied on for reversal. It is doubtful, therefore, under the authorities, *supra*, whether appellant by its brief has presented any question other than that presented by point two. However, inasmuch as neither paragraph of the complaint has been questioned, either in the trial court or in this court, we assume that by his first proposition appellant intended to challenge the decision of the trial court as not being sustained by sufficient evidence in that the contract offered in evidence and above set out is so vague, indefinite and ambiguous that the trial court could not have known what was intended and agreed on by the parties.

Whether a complaint based on such contract unaided by other averments, would be sufficient against a demurrer, we need not and do not decide. For the purposes of

5. the question indicated, it is sufficient to say that there was evidence tending to show that both parties understood what was intended by their contract and that appellee had partly performed it and there was also evidence tending to show how both parties had construed the contract as affecting such part performance. There was, therefore, sufficient evidence to enable the trial court to ascertain all the essential elements, terms and conditions of such contract, to which the parties intended to bind themselves, and hence, sufficient under the law to support the decision of such court. *Witty v. Michigan Mut. Life Ins. Co.* (1890), 123 Ind. 411, 24 N. E. 141, 18 Am. St. 327, 8 L. R. A. 365; *Olcott v. McClure* (1912), 50 Ind. App. 79, 85, 86, 98 N.

E. 82. By point two, *supra*, appellant questions the

6. sufficiency of the evidence on the element of damages, viz., that there was no evidence that appellee was damaged. There was at least some evidence from which the court may have inferred damages in some amount which would be sufficient as against said objection. The record

supports us in saying further that there was some evidence from which the court might have properly found that appellee was damaged in an amount equal to or greater than the judgment here rendered. Assuming that by point three, *supra*, appellant intended to challenge the sufficiency of the evidence to show the authority of Grantham to sign the contract in question, and bind appellant thereby, we have examined the evidence on this subject and are of the opinion that the trial court was warranted in inferring such authority from the evidence of Grantham, himself.

Under the issues tendered by appellee's second and third paragraphs of complaint appellant's point four, viz., that "the release executed by Hosanna was a complete bar to this suit" must necessarily depend on the evidence affecting the validity of such release. There is evidence tending to show that appellant, at the time such release was secured from Hosanna, knew that he, Hosanna, had nothing to do with the contract with appellee; that appellant had notified appellee that Hosanna must not have anything more to do with said contract and that appellant would look to appellee Yonan individually for the performance of said contract.

The evidence was conflicting on most, if not all of the above facts and hence, under the well-settled rule of this court, the decision of the trial court as to such questions of fact is conclusive on appeal. The judgment below is therefore affirmed.

NOTE.—Reported in 109 N. E. 922. See, also, under (1) 3 Cyc. 275; (2) 3 C. J. 1410; 2 Cyc. 1014; (3) 3 C. J. 1431; 2 Cyc. 1017; (5) 9 Cyc. 775; (6) 3 Cyc. 360.

THE GEISSLER SHOE COMPANY v. LOUISA M. BRITZ
ET AL.

[No. 8,973. Filed May 28, 1915.]

From Superior Court of Vanderburgh County; *F. M. Hostetter*, Judge.

Action between The Geissler Shoe Company and Louisa M. Britz and another. From a judgment for the latter, the former appeals.

Elmer Q. Lockyear and *D. F. Seacat*, for appellant.

John E. Iglehart, *Edwin Taylor*, *Eugene H. Iglehart* and *George D. Heilman*, for appellees.

PER CURIAM.—The judgment of the trial court is affirmed.

BUCK v. KOONTZ.

[No. 8,635. Filed June 4, 1915.]

From Marshall Circuit Court; *Harry Bernetha*, Judge.

Action between Ira D. Buck and Samuel Koontz. From a judgment for the latter, the former appeals.

E. C. Martindale, for appellant.

Harley A. Logan, for appellee.

PER CURIAM.—Judgment affirmed.

INDEX

[NOTE.—The citation *Fender v. Phillips*, 85, 95 (8), indicates that the case begins on page 85, the point cited is on page 95, and that such point is numbered 8 in the margin.—REPORTER.]

ABATEMENT—

Answer in, see INSURANCE 1.

Ruling on demurrer to answer in, see APPEAL 127.

A demurrer to an answer or plea in, that it does not "state facts sufficient to constitute a cause of defense" is bad in form, see PLEADING 8.

ACCEPTANCE—

Of forged note believed to be genuine does not discharge debt, see BILLS AND NOTES 6.

ACCIDENTS—

On crossing, see RAILROADS 4-25; STREET RAILROADS 1, 2.

ACTION—

See EASEMENTS 1, 2; INSURANCE 1, 13; RAILROADS 46-50.

Dismissal of original, see ATTACHMENT 2, 3.

For breach of warranty, see SALES.

For damages, see INSURANCE 7.

For injuries to live stock, see CARRIERS 1.

On note, see EXECUTORS AND ADMINISTRATORS 2.

On official bond, see OFFICERS 1.

On policy, see INSURANCE 2-4.

For rent, see LANDLORD AND TENANT 1.

For wrongful death, see DEATH 1.

Right to maintain, on insurance policy, see INSURANCE 6.

Dismissal by Party.—Statutes.—Under §339 Burns 1914, §334 R. S. 1881, providing that a plaintiff may dismiss his action in vacation, the judgment of the court at the next term is necessary to complete such dismissal; hence an attempted dismissal in vacation by an administrator of his petition for the confirmation of a contract entered into was ineffectual where judgment of dismissal was not thereafter rendered by the court.

Fender v. Phillips, 85, 95 (8).

ADMINISTRATOR—

Rights and liabilities of, on death of lessee, see LANDLORD AND TENANT 2.

ADMISSION—

Of evidence, see APPEAL 68, 120, 121.

ADVERSE POSSESSION—

See RAILROADS 49.

AFFIDAVIT—

In support of a motion for new trial on the ground that a juror was disqualified, see NEW TRIAL 4.

AFFIRMANCE—

See APPEAL 132-135.

AMENDMENT—

Deemed made, see APPEAL 14.

ANIMALS—

Injuries to, on tracks, see RAILROADS 28-32.

Wilful Injuries.—Pleading.—Complaint.—Contributory Negligence.
—A complaint charging wilful injuries to animals need not aver that plaintiff was without fault, but is sufficient on that theory if the language shows that the defendant had an intent, either actual or constructive, to do the injury complained of.

Chicago, etc., R. Co. v. Leiter, 212, 215 (3).

ANSWER—

See PLEADING.

ANSWERS TO INTERROGATORIES—

See TRIAL.

APPEAL.

- | | |
|---|--|
| I. APPELLATE JURISDICTION, 1, 2. | VI. RECORD AND PROCEEDINGS NOT IN RECORD, 35. |
| II. DECISIONS REVIEWABLE, 3-13. | VII. ASSIGNMENT OF ERRORS, 36-45. |
| III. PRESENTATION AND RESERVATION IN LOWER COURT, | VIII. BRIEFS, 46-59. |
| (a) ISSUES AND QUESTIONS IN LOWER COURT, 14-18. | IX. DISMISSAL, 60-64. |
| (b) OBJECTIONS AND MOTIONS AND RULINGS THEREON, 19, 20. | X. REVIEW, |
| (c) MOTION FOR NEW TRIAL, 21-24. | (a) AS TO EVIDENCE, 65-72. |
| IV. PARTIES, 25, 26. | (b) AS TO INSTRUCTIONS, 73-91. |
| V. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE, | (c) AS TO PLEADINGS, 92-99. |
| (a) TIME OF TAKING PROCEEDINGS, 27. | (d) VERDICT, FINDINGS AND ANSWERS TO INTERROGATORIES, 100-118. |
| (b) NOTICE, 28-30. | (e) HARMLESS ERROR, 119-123. |
| (c) COSTS, 31-34. | (f) ERROR WAIVED, 130, 131. |
| | XI. DETERMINATION AND DISPOSITION OF CAUSE, |
| | (a) AFFIRMANCE, 132-135. |
| | (b) REVERSAL, 136, 137. |

See JUDGMENT; NEW TRIAL 6.

On question of damages, see MUNICIPAL CORPORATIONS 8-10.

Presenting question on, see VENUE 2.

I. APPELLATE JURISDICTION.

1. *Jurisdiction.—Notice to Coparties.*—In order to confer jurisdiction in a vacation appeal all coparties to the judgment must be joined as appellants and be duly notified, or the court acquires no jurisdiction to determine the case on its merits, and must dismiss the appeal.
Smith v. Hibben, 438, 447 (6).

APPEAL—Continued.

2. *Jurisdiction.—Briefs.—Record.*—Where the facts disclosed by the briefs and record on appeal disclose a question as to the court's jurisdiction of the appeal, that question must be determined before the merits can be considered, although not presented by a motion to dismiss. *Smith v. Graves*, 55, 58 (1).

II. DECISIONS REVIEWABLE.

3. *Presenting Error.—Burden.*—The burden is upon appellant to show reversible error.
American, etc., Tin Plate Co. v. Yonan, 700, 703 (1).
4. *Burden to Show Error.*—The burden is on appellant to show the commission of harmful error.
Ferdinand R. Co. v. Bretz, 123, 125 (3).
5. *Judgments Appealable.—Order Setting Aside Default.*—An order setting aside a judgment taken by default is not a final judgment from which an appeal will lie. *O'Neil v. Hudson*, 541.
6. *Questions Reviewable.—Evidence Not in Record.*—Where the only questions sought to be presented depend upon the evidence, and the evidence is not in the record, there is nothing to be determined.
Wilson v. Kester, 471 (1).
7. *Review.—Discretion.—Jury.*—The trial court is vested with large discretion in its decisions as to the competency of jurors, and it is only when it appears that such discretion has been abused that the court on appeal can interfere.
Maffenbeier v. Koenig, 518, 521 (3).
8. *Review.—Motion to Make Specific.—Record.*—No question is presented for review on the overruling of a motion to make the complaint more specific where it can not be determined from the record whether appellant assigning the error, or some other defendant, filed the motion.
Julius Keller Constr. Co. v. Herkless, 472, 476 (1).
9. *Questions Reviewable.—Ruling on Demurrers.*—No question is presented on the overruling of demurrers to certain paragraphs of answer, where neither appellant's brief nor the record discloses that a memorandum of defects was filed with such demurrers, as required by §344 Burns 1914, Acts 1911 p. 415.
Clevenger v. Clevenger, 13.
10. *Ruling on Motion for Judgment on Answers to Interrogatories.—Scope of Review.*—In determining whether the trial court erred in sustaining a motion for judgment on the jury's answers to interrogatories notwithstanding the general verdict, the court on appeal is confined to a consideration of the facts pleaded, the answers to the interrogatories, and the general verdict.
Lutz v. Cleveland, etc., R. Co., 16, 18 (1).
11. *Finality of Judgment.—Review.*—In an action to quiet title and for possession of real estate where the special findings and conclusions of law covered all the issues between the parties, but the record discloses no judgment against appellants as to the interest which the court found to be held by one who was a defendant to appellant's cross-complaint, the issue as to such defendant was not adjudicated, and hence the judgment was not a final judgment from which an appeal would lie.
Daegling v. Strauss, 672, 676 (1).
12. *Petition for Rehearing.—Questions Reviewable.*—Where on the original presentation of an appeal from the judgment in a suit

APPEAL—Continued.

to foreclose mercantile chattel mortgages, no contention was made that the mortgages did not cover all additions the mortgagor made to the stock, the court will not, on petition for rehearing, pass upon the proposition that the lien of such mortgages only attached to such additions to the stock as were paid for out of proceeds from sales made.

Vermillion v. First Nat. Bank, 35, 54 (9).

13. *Review.—Questions Not Presented.*—Where the record, in an action against a city to recover for personal injuries caused by the defective condition of a sidewalk, showed that no objection referring to the subject of the injuries was interposed to the reading in evidence of the notice of injury required by §8962 Burns 1914, Acts 1907 p. 249, but that after it was read, appellant moved to strike out all testimony that had been given respecting injuries not covered by the notice, and which had been heard without objection, and it further appeared that the overruling of such motion had not been assigned as error, and that no instruction had been requested excluding from the consideration of the jury in assessing damages the injuries claimed not to have been covered by the notice, the question of the sufficiency of such notice in its relation to the injury suffered was not presented for review.

City of East Chicago v. Gilbert, 613, 624 (8).

III. PRESENTATION AND RESERVATION IN LOWER COURT.**(A) ISSUES AND QUESTIONS IN LOWER COURT.**

14. *Review.—Disposition of Cause.—Amendment Deemed Made.*—Where evidence showing a permanent injury to the fee of plaintiff's land was admitted without objection, the court on appeal, as against the objection made for the first time that the complaint does not warrant the allowance of damages for injury to the fee, will treat the complaint as having been amended in the trial court, if such amendment is necessary to sustain the judgment.

Vandalia R. Co. v. House, 10, 12 (4).

15. *Questions Reviewable.—Decision of Trial Court.—Conclusiveness.*—Where the question involved was whether a note executed by appellee's decedent was void as having been executed as a secret preference to appellant in effecting a composition with decedent's creditors, and appellant contended that it was executed voluntarily after the composition with creditors had been consummated, the decision of the trial court in favor of appellee must be deemed conclusive unless it can be said that there was no probative evidence in its support.

Citizens Nat. Bank v. Kerney, 96, 104 (3).

16. *Review.—Moot Questions.*—In an action for damages and injunctive relief for the violation of an agreement executed in connection with the assignment of letters patent covering a manufacturing process, where the record disclosed that plaintiff dismissed its demand for damages, and it also appears that such letters patent have expired, the question of whether the denial of the injunctive relief was error need not be determined, since any right of privilege covered by the letters terminated with their expiration, leaving the question merely a moot one.

Buffalo Specialty Co. v. Indiana, etc., Wire Co., 465, 469 (2).

17. *Review.—Issues.—Equitable Set-Off.—Subsequent Answer of Statutory Set-Off.*—Where defendant bank had applied the amount of a deposit made by plaintiff's decedent as a credit on dece-

APPEAL—Continued.

dent's unmatured note which the bank then held, and, in an action by plaintiff to recover the amount of the deposit, pleaded an equitable set-off, defendant's filing of a further paragraph of answer, after the note had matured, of statutory set-off based on such note, in effect took the former out of the case, or at least so shaped the issues that the disposition of any question affecting the equitable set-off was rendered unimportant to defendant.

Citizens Nat. Bank v. Kerney, 96, 103 (2).

18. *Questions Reviewable.—Demurrer to Answer.—Validity of Contract.—Memorandum of Defects.—Sufficiency.*—Where defendant railroad company answered that plaintiff was a member of a relief association maintained by defendant and had accepted benefits on account of his injuries, etc., a memorandum of defects accompanying a demurrer to such answer, setting out that the contract relied on was void because it was an attempt by the company to exonerate itself by contract from the results of its own negligence, was sufficient to warrant the court in taking into consideration the provisions of §5308 Burns 1914, Acts 1907 p. 46, relating to contracts of membership in railroad relief associations, in determining the sufficiency of such answer to withstand the demurrer. (*Stiles v. Hasler* [1914], 56 Ind. App. 88; *State, ex rel. v. Bartholomew* [1911], 176 Ind. 182; *Spiro v. Robertson* [1914], 57 Ind. App. 229; and *Blair Baker Horse Co. v. Railroad Transfer Co.* [1915], 59 Ind. App. 505, distinguished.)
Bocs v. Grand Rapids, etc., R. Co., 271, 278 (6), 278 (6).

(B) OBJECTIONS AND MOTIONS AND RULINGS THEREON.

19. *Review.—Overruling Motion to Make Specific.*—The overruling of a motion to make a complaint more specific is so far within the discretion of the trial court that a cause will not be reversed on that ground in the absence of a showing that the rights of the complaining party have suffered.
Adams Express Co. v. Welborn, 330, 332 (2).
20. *Review.—Motion to Make Specific.*—There was no reversible error in the overruling of a motion to require the complaint to be made more specific, where most of the details called for were peculiarly within the knowledge of defendants, who were in no way deprived of any right by the ruling, and where, on the facts of the case, the motion presented a question within the discretion of the trial court. *Rock Oil Co. v. Brumbaugh*, 640, 646 (1).

(C) MOTION FOR NEW TRIAL.

21. *Review.—Overruling Motion for New Trial.*—Where the specifications in a motion for new trial were such as to present no questions for review, there was no error in the overruling of same.
McClain v. Steele, 657, 660 (4).
22. *Presenting Questions for Review.—Peremptory Instructions.*—Error in the giving or refusing of a peremptory instruction can not be presented by independent assignment of errors, but is ground for a new trial.
Deeter v. Burk, 449, 453 (1).
23. *Bill of Exceptions.—Filing.—Extension of Time.*—Under §656 Burns 1914, §626 R. S. 1881, an extension of the time beyond the term for filing a bill of exceptions, to be effective, must be granted when the motion for a new trial is overruled.

Wilson v. Kester, 471 (2).

24. *Review.—Ruling on Motion for New Trial.—Waiver of Objections.*—Where it does not in any manner appear that appellant

APPEAL—Continued.

objected to the trial court disposing of the motion for new trial without hearing argument thereon, appellant can not be heard to make such objection on appeal.

Sovereign Camp, etc. v. Latham, 290, 308 (13).

IV. PARTIES.

25. Where the jury finds against certain defendants and in favor of others, the latter are neither necessary nor proper parties to an appeal from the judgment on such verdict.

Smith v. Graves, 55, 58 (3).

26. *Review.—Change of Names.*—Appellants from a decree for specific performance to convey were not deprived of any substantial right by the fact that after suit was commenced plaintiff railroad company was consolidated with another, and the consequent change of names, where the real party in interest continued to prosecute the suit to final judgment and on appeal.

Bronnenberg v. Indiana Union Traction Co., 495, 500 (6).

V. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.**(A) TIME OF TAKING PROCEEDINGS.**

27. *Imperfect Term Time Appeal.—Failure to Perfect Vacation Appeal.*—Where the record discloses that appellants undertook to perfect a term time appeal, which was later abandoned, and it appears that the judgment was a joint judgment against joint defendants, one of whom was a nonresident who was defaulted and took no steps to appeal, and notice of appeal was served below upon such codefendant, and upon the appellees, but that the transcript was not filed within sixty days from the time of giving such notice, the notice was unavailable for the perfection of a vacation appeal.

Smith v. Hibben, 438, 443 (3).

(B) NOTICE.

28. *Notice to Coparties.—Statutes.*—Provision for notice to coparties in vacation appeals, where all the parties affected by the judgment do not join in the appeal, is made only in §674 Burns 1914, Acts 1899 p. 5, and, in such appeal notice must be served on the coparties not joining and the proof thereof must be filed in the office of the clerk of the court to which the appeal is taken.

Smith v. Hibben, 438, 445 (4).

29. *Notice.—Record.—Conclusiveness.*—Where it appears from the precept and also from the clerk's certificate to the transcript that the notices of appeal, which appellant contends bear the file mark of the clerk of the court on appeal in compliance with §674 Burns 1914, Acts 1899 p. 5, were placed on file in the office of the clerk of the trial court, the record is conclusive, and such notices can not be considered as original notices filed only in the office of the clerk of the Appellate Court.

Smith v. Hibben, 438, 442 (2).

30. *Ineffectual Notice.—Failure to Perfect Notice.—Dismissal.*—Under Rule 36 of the Supreme and Appellate Courts, a dismissal of an appeal is required where the cause has been on the docket ninety days or more, and there has been no appearance by appellee and no steps have been taken to bring him into court, or where notice given was ineffectual and no steps have been taken for more than ninety days after issuance thereof to bring appel-

APPEAL—Continued.

lee into court; hence where an appeal, in which the notice to co-parties and to appellees was ineffectual, had remained upon the docket without any subsequent steps to procure service of proper notice, appellees were not precluded from urging a dismissal after submission and after procuring an extension of time for filing briefs, since appellants were not entitled to a submission, and the defect in service of notice on the coparty was one which is not waived by failure to move for dismissal until after submission and the filing of briefs. *Smith v. Hibben*, 438, 446 (5).

(C) Costs.

31. *Disposition of Cause.*—Where on appeal the judgment is neither affirmed in whole, nor reversed in whole, the court under §706 Burns 1914, §604 R. S. 1881, may award the costs as it deems right. *Adams Express Co. v. Welborn*, 330, 337 (8).
32. *Disposition of Cause.*—Where the judgment was affirmed on condition that appellee enter a remittitur, and otherwise to stand reversed because of error in the conclusion of law stated on the facts found, the cost of the transcript of the evidence was assessable to appellant, since the evidence was unnecessary to present the error. *Adams Express Co. v. Welborn*, 330, 337 (9).
33. *Preparation of Record.*—Section 707 Burns 1914, §665 R. S. 1881, authorizes the collection of the fees of the clerk of the trial court for the transcript, and of the stenographer for the transcript of the evidence, as a part of the costs of the court on appeal, recoverable by the successful party. *Adams Express Co. v. Welborn*, 330, 336 (6).
34. *Time and Manner of Taxation.*—There is no statutory provision either as to the time or manner of taxing of the costs of preparing the record, and at all events such costs may be taxed while the cause is still pending and within the time allowed for filing a petition for rehearing. *Adams Express Co. v. Welborn*, 330, 336 (7).

VI. RECORD AND PROCEEDINGS NOT IN RECORD.

35. *Review.—Bill of Exceptions.—Failure to File in Time.*—When time for filing a bill of exceptions is granted it must be filed within that time, so that where it appeared that the bill of exceptions was not presented to the trial judge until after the expiration of the time granted for filing, and no extension of the time originally granted was shown, the bill was not in the record so as to present any question thereon for consideration. *Farabee v. Warren*, 81.

VII. ASSIGNMENT OF ERRORS.

36. *Waiver.*—Errors assigned but not presented by appellant's brief are waived. *Picken v. Miller*, 115, 118 (1).
37. *Waiver.*—Error assigned, but not presented by appellant's brief, is waived. *Muncie Electric Light Co. v. Jotiff*, 349, 353 (1).
38. *Requisites.*—An assignment of error to be sufficient should specify with reasonable certainty the ruling to be reviewed. *Eckhart v. Marion, etc., Traction Co.*, 217, 221 (3).
39. *Waiver.—Briefs.*—An assignment of error challenging the sufficiency of the complaint is waived, if not presented by appellant's brief. *Citizens Nat. Bank v. Kerney*, 96, 103 (1).

APPEAL—Continued.

40. *Waiver*.—An error assigned is waived by appellant's failure to set out in its brief, under a separate heading of such error, separately numbered propositions or points relating thereto.

Chicago, etc., R. Co. v. Collins, 572, 582 (7).

41. *Assignment of Errors—Sufficiency of Complaint*.—In actions commenced since the enactment of §§344, 348 Burns 1914, Acts 1911 p. 415, no question is presented on appeal by an assignment of error challenging the sufficiency of the complaint.

Julius Keller Constr. Co. v. Herkless, 472, 477 (2).

42. *Assignment of Errors—Signature—Sufficiency*.—Where the names of appellant's attorneys appeared below the assignment of errors in typewriting, instead of being signed by them in person, and the record disclosed that the same attorneys were appellant's attorneys in the lower court, the assignment was not open to attack on the ground that it was not signed.

Boes v. Grand Rapids, etc., R. Co., 271, 274 (2).

43. *Assignment of Errors—Questions Presented*.—No question is presented for review by an assignment that the court erred in rendering judgment, since ordinarily the rendering of judgment is not in itself a ruling but is dependent on some prior ruling or succession of rulings, and it can not be ascertained from such an assignment what particular ruling it is desired to challenge.

Eckhart v. Marlon, etc., Traction Co., 217, 220 (1).

44. *Assignment of Errors—Sufficiency*.—An assignment that "the court erred in awarding judgment to the appellee on the answers to the interrogatories propounded to the jury trying this cause notwithstanding the general verdict", though irregular in form and not to be commended as a model, referred to a single action of the court and left no doubt as to the identity of the ruling intended to be presented for review, and was therefore sufficient to present the question of error in sustaining the motion for judgment *non obstante*.

Eckhart v. Marlon, etc., Traction Co., 217, 220 (2), 221 (2).

45. *Assignment of Errors—Questions Presented—Scope of Review*.—In a suit for injunction, where a demurrer was sustained to the complaint, the temporary restraining order dissolved, and judgment rendered for defendant on plaintiff's refusal to plead further, no question is presented by an assignment of error on appeal that "the court erred in rendering judgment against the appellants in favor of appellee", and since, on plaintiff's refusal to plead further, the dissolution of the restraining order and judgment for appellee followed as a matter of course, questions attempted to be raised by the quoted assignment, as well as by alleged error in dissolving the restraining order, are determined by a disposition of the assignment of error in sustaining the demurrer.

Glendenning v. Cowan, 529, 532 (1).

VIII. BRIEFS.

46. *Assignment of Errors*.—Under Rule 22 the court must ignore any alleged error not referred to in the points and authorities contained in appellant's brief.

American, etc., Tin Plate Co. v. Yonan, 700, 703 (2).

47. *Waiver of Error*.—An assignment of error is waived by appellants' failure to present the question in the points and authorities set out in its brief. *Vincennes Traction Co. v. Curry*, 683, 687 (1).

APPEAL—Continued.

48. *Waiver of Error.*—Alleged error in overruling a motion for new trial is waived as to causes therein assigned which are not supported by any point or proposition in appellant's brief.
Indiana Union Traction Co. v. Cauldwell, 513, 515 (2).
49. *Waiver of Error.*—Assignments in the motion for new trial respecting the admission and exclusion of evidence are waived by the failure of appellant's brief to contain any point directed to them.
City of East Chicago v. Gilbert, 613, 630 (15).
50. *Sufficiency.*—Appellants' brief, though subject to criticism, will be treated as sufficient if there is such substantial compliance with the rules as to enable the court to determine therefrom the question for consideration.
Deal v. Plass, 185, 187 (1).
51. *Questions Reviewable.*—No question is presented for review on the overruling of a motion for new trial, where appellant's brief wholly fails to meet the requirements of the Supreme and Appellate Court rules in such respect.
Town of Newpoint v. Cleveland, etc., R. Co., 147, 158 (8).
52. *Review.*—*Sufficiency.*—Where appellant's brief shows a substantial and good-faith effort to comply with the rules of the Supreme and Appellate Courts with reference to presenting rulings on demurrers, the questions presented on such rulings will be considered.
Town of Newpoint v. Cleveland, etc., R. Co., 147, 154 (1).
53. *Petition for Rehearing.*—On a petition for rehearing appellant may not present points not presented in its original brief, and is not entitled to have its statement of the evidence modified or enlarged to present a point not made in its original brief or mentioned in its reply brief.
Chicago, etc., R. Co. v. Roth, 161, 168 (8).
54. *Sufficiency.*—Where appellant's brief is so prepared that any member of the court may know from it alone, without reference to the record, the exact question which the court is called on to determine, it is sufficient, even though the exact letter of the rules have not been complied with in every respect.
Boes v. Grand Rapids, etc., R. Co., 271, 274 (1).
55. *Sufficiency.*—Although appellants' brief may be subject to criticism, it will be treated as sufficient where a good-faith effort to comply with the rules is shown and there is such substantial compliance therewith as to enable the court to ascertain therefrom the error assigned and relied on for reversal and the proposition on which the error is based.
Smith v. Smith, 169, 171 (1).
56. *Review.*—*Waiver of Error.*—Where neither the motion for a new trial nor its substance is set out in appellant's brief, and the brief neither shows that any exceptions were reserved to the ruling thereon, nor contains points directed to the assignment of error in the ruling thereon, all questions arising on the overruling of such motion are waived.
Vandalla Coal Co. v. Bland, 308, 311 (1).
57. *Points and Authorities.*—The mere statement of an abstract proposition of law under the heading "points and authorities" in no way addressed to, or applied to, any particular error relied on for reversal, presents no question on the overruling of a motion for new trial containing several grounds to which such propositions may apply, but if only one error is relied on all propositions will be regarded as referring thereto.
American, etc., Tin Plate Co. v. Yonan, 700, 703 (3).

APPEAL—Continued.

58. *Points and Authorities.*—Where a proposition set out in appellant's brief contained no reference to any error relied on, merely stating that the alleged contract sued on was so indefinite and uncertain that it was unenforceable, the court could assume, in view of the fact that the complaint was not challenged, that it was intended to challenge the decision of the trial court as not being sustained by sufficient evidence in that the contract offered in evidence was so vague, indefinite and ambiguous that the trial court could not have known what was intended and agreed on by the parties. *American, etc., Tin Plate Co. v. Yonan*, 700, 704 (4).
59. *Questions Reviewable.*—Where appellants' brief does not disclose what the judgment or decree was, does not contain separately numbered propositions or points and authorities under each heading of error relied on, and, instead of a condensed recital of the evidence, sets out the conclusions of counsel as to what the evidence shows, there has been no proper compliance with the requirements of Rule 22, and nothing is presented for consideration. *Johnson v. Bebout*, 159.

IX. DISMISSAL.

60. *Review.—Parties.*—In an action against three defendants for malicious prosecution, where the verdict and judgment were against two of the defendants without a finding either for or against the third, an appeal taken by each of the three must be dismissed as to the third, since there was no judgment from which he could appeal. *Smith v. Graves*, 55, 62 (7).
61. *Failure to Perfect as to Coparty.*—Where the notice to a coparty was defective and the cause remained upon the docket beyond the time allowed without any steps to perfect the appeal as to such coparty, jurisdiction could not be conferred by dismissal of the appeal as to such coparty on his motion setting up that he had no desire to join therein, since where an appeal is not perfected within the time allowed by statute, no steps can thereafter be taken that will confer jurisdiction. *Smith v. Hibben*, 438, 447 (7).
62. *Review.—Unauthorized Change in Record.*—Where appeal was granted upon the filing of an appeal bond within thirty days, but the surety was not named in the record, and appellant attempted to perfect a term time appeal by filing the bond within the required time, and it was made to appear that after the transcript was filed the order book entry and the transcript were each altered, without *nunc pro tunc* proceeding, so as to show the naming of such surety, the appeal was not perfected as a term time appeal, and the time having elapsed for perfecting a vacation appeal, a dismissal was required. *Ripley v. Baldwin*, 77, 78 (1), 79 (1).
63. *Record.—Bill of Exceptions.*—A bill of exceptions, to become a part of the record, must be signed by the trial judge and duly filed with the clerk or in open court, which is a judicial act that can neither be dispensed with nor aided by the certificate of the shorthand reporter; hence where the bill of exceptions did not appear to have been signed by the trial judge, or filed as required, and the only question sought to be raised related to the admission of evidence, there was nothing before the court for determination and a dismissal of the appeal was required. *Indianapolis Outfitting Co. v. Brooks*, 79.

APPEAL—Continued.

64. *Extension of Time for Briefs.—Subsequent Filing of Motion to Dismiss.—Right to Consideration of Motion.*—Although Rule 21½ requires that a petition for extension of time to file briefs must show that all motions to dismiss and all dilatory motions on behalf of the petitioner have been filed, a party procuring an extension thereunder is not necessarily deprived of the right to subsequently move for a dismissal of the appeal, especially where it appears from the petition on which the extension was granted that petitioner did not intend to waive the right to move to dismiss the appeal if cause for dismissal should thereafter be discovered, or where it appears on the facts of the case that the same result would follow independently of the action of the court in granting the extension of time. *Smith v. Hibben*, 438, 441 (1).

X. REVIEW.

(A) AS TO EVIDENCE.

65. *Sufficiency.*—In determining the sufficiency of the evidence to sustain the verdict, the court on appeal is required to look only to that evidence most favorable to appellee.
Cleveland, etc., R. Co. v. Means, 383, 412 (17).
66. *Sufficiency.*—Where the evidence is conflicting, the court on appeal will consider only that which supports the finding or verdict, and if that evidence is sufficient, the finding or verdict will not be disturbed.
Vandalia R. Co. v. House, 10, 12 (2).
67. *Weight and Sufficiency.*—The court on appeal will not weigh the evidence, and, in determining its sufficiency to support the finding, will consider only that portion which is favorable to appellee.
McKinzie v. Fisher Gibson Co., 14, 15 (2).
68. *Admission of Evidence.*—Appellant can not complain of the action of the trial court in permitting certain testimony to be given on reexamination of a witness where it appears that the subject to which the testimony related was introduced by appellant on the cross-examination.
City of East Chicago v. Gilbert, 613, 630 (14).
69. *Verdict.*—The court on appeal in determining whether the evidence is insufficient to sustain the verdict, as showing the injury resulted from plaintiff's contributory negligence, must determine such question of contributory negligence from a consideration of the evidence most favorable to plaintiff, and plaintiff's own testimony, being the most favorable to her upon the question, must for that purpose be taken as true.
Chicago, etc., R. Co. v. Collins, 572, 578 (2).
70. *Verdict.—Excessive Damages.*—Although the evidence in an action for malicious prosecution was sharply conflicting on many issuable facts, the verdict for plaintiff can not be disturbed, either on the evidence or on the ground that the damage awarded was too large, where there was evidence to sustain the verdict, and the amount awarded was not such as to warrant the court in holding that it was excessive.
Smith v. Graves, 55, 67 (14).
71. *Sufficiency.*—In an action against a husband and wife to recover for automobile supplies sold and delivered to a garage alleged to have been operated by defendants, evidence showing that the wife had been the owner of a farm which had been deeded to her by her husband without consideration, and which, through the negotiations of her husband, was traded for the garage, which

APPEAL—Continued.

was taken over and held in her name, was sufficient to support a finding and judgment against the wife alone.

McKinzie v. Fisher Gibson Co., 14, 15 (1).

72. *Measure of Damages.—Instructions.*—In an action for damages sustained in being struck by a car at a street crossing, where the evidence showed that plaintiff was injured and taken to a hospital and had expended the sum of forty dollars for hospital expenses, the evidence was within the issues and warranted the giving of an instruction advising the jury that it could "take into consideration expenses, if any, actually incurred as a result of his injuries"; and even were the instruction erroneous its giving was harmless in view of other instructions telling the jury that its finding must be based on the evidence, and in view of the fact that there is no room for presuming that the jury allowed anything on that feature of the damages other than the amount proven. *Chicago, etc., R. Co. v. Roth*, 161, 166 (5).

(B) AS TO INSTRUCTIONS.

73. There is no error in the giving or refusing of instructions where it appears from the record that the jury was fully and fairly instructed. *City of East Chicago v. Gilbert*, 613, 630 (16).
74. Instructions should be considered as a whole, and if, thus considered, they state the law fairly and accurately, objections thereto are unavailable. *Rock Oil Co. v. Brumbaugh*, 640, 656 (14).
75. Part of an instruction, even if subject to the objections urged when standing alone, does not render the instruction fatal, where such objection is not tenable when the instruction is considered as a whole. *W. McMillen & Son v. Hall*, 545, 563 (19).
76. There was no error in instructing on the doctrine of last clear chance where one of the paragraphs of complaint was sufficient to invoke that doctrine, nor in giving an instruction in language which, though formerly disapproved by the Appellate Court, has since been approved by the Supreme Court.
Picken v. Miller, 115, 119 (4).
77. The giving of an instruction to the effect that if the jury found that defendant was running its car in violation of a city speed ordinance it was guilty of negligence *per se*, but not stating that such negligence would entitle plaintiff to recover, was not objectionable in leaving out of consideration the question of proximate cause. *Louisville, etc., Traction Co. v. Lottich*, 428, 436 (12).
78. Objection to certain instructions on the ground that they omit the element of defendant's negligence in stating the condition of liability under the complaint is not available, where other instructions clearly and definitely included the element of negligence and it conclusively appears from the jury's answers to interrogatories that defendants were not harmed by the giving of the instructions complained of.
Rock Oil Co. v. Brumbaugh, 640, 656 (13).
79. The objection that an instruction on the subject of contributory negligence informed the jury that all evidence of contributory negligence must come from the defendant, can not prevail where the closing part of the instruction stated that the burden of proving the defense of contributory negligence was on defendant, but if the evidence in the case, whether produced by the plaintiff or the defendant, or both of them combined, established contributory negligence, it would be available as a defense.
Pittsburgh, etc., R. Co. v. Macy, 125, 136 (11).

APPEAL—Continued.

80. Where each of three paragraphs of complaint in an action for malicious prosecution stated a cause of action against all the defendants, an instruction that if the evidence established all the material allegations of either of such paragraphs the finding should be against all the defendants, was not erroneous, especially since the instructions given are to be considered together, and the court by other instructions advised the jury that it might find against such defendant or defendants, only as the evidence warranted. *Smith v. Graves*, 55, 66 (13).
81. An instruction in a servant's action for personal injuries advising the jury that in determining the question of defendant's negligence it could consider certain things "and all other facts and circumstances which you may determine as bearing upon such question", was too broad as not confining the jury to the facts directly pertaining to that question, and its giving was error in view of the many facts introduced that were not proper to be considered on the question of defendant's negligence. *Kokomo Brass Works v. Doran*, 583, 595 (8).
82. In an action for injuries to a traveler on a public street who was struck at a railroad crossing, where it was alleged that the train was operated at a speed in excess of that allowed by an ordinance, and in violation of the statute, instructions telling the jury that on due proof of the violation of such ordinance, or of the statute, and that such violation was the proximate cause of plaintiff's injury, he could recover, if free from contributory negligence, and which dealt with the conditions alleged, of which there was proof, and told the jury that plaintiff was at all times bound to use his senses and to exercise care commensurate with the danger and conditions confronting him, were unobjectionable. *Pittsburgh, etc., R. Co. v. Macy*, 125, 139 (15).
83. *Incomplete Instructions.*—A party can not predicate error on the giving of an incomplete instruction, in the absence of a showing that a correct and complete instruction on the subject was tendered and refused. *Pittsburgh, etc., R. Co. v. Macy*, 125, 135 (9).
84. *Issues.—Burden of Proof.—Peremptory Instructions.*—In an action against the estate of a decedent upon a promissory note, the contention of appellant that, since the defense of *non est factum* placed on plaintiff the burden of proof on the question of execution and the evidence in support of such execution, though uncontradicted, was verbal, it was error for the court at plaintiff's request to peremptorily instruct the jury for plaintiff, on the ground that it deprived defendant of the right to have the credibility of the witnesses and the weight of their testimony determined by the jury, can not prevail in view of the fact that defendant first asked for a peremptory instruction, thereby inviting the action of the court, to which he at no time objected on the ground that he was entitled to have any question of fact submitted to the jury. *Deeter v. Burk*, 449, 454 (3).
85. *Refusal of Instructions.*—Appellant is not harmed by the refusal of requested instructions, where those given cover the issues and are applicable to the facts. *W. McMillen & Son v. Hall*, 545, 564 (21).
86. *Refusal of Instructions.*—Where the instructions given covered all questions at issue under every phase of the evidence, there was no error in refusing other instructions. *Smith v. Graves*, 55, 66 (12).

APPEAL—Continued.

87. *Refusal of Instructions.*—There was no error in the refusal of requested instructions, which, in so far as they correctly stated the law, were fully covered by others given.

Louisville, etc., Traction Co. v. Lottich, 426, 437 (14).

88. *Refusal of Instructions.*—*Tender After Commencement of Argument.*—Error can not be predicated on the refusal to give an instruction which was not tendered until after the argument began.

Klitzke v. Smith, 461, 465 (2).

89. *Refusal of Instructions.*—Where appellant concedes that an instruction given by the court was of the same tenor as one requested by appellant and refused, excepting as to a date set forth therein, and there was no material dispute as to the correctness of the date stated in the court's instruction, and the latter was neither erroneous nor otherwise complained of, there was no error in refusing the requested instruction.

Klitzke v. Smith, 461, 464 (1).

90. *Refusal of Instructions.*—In an action against a street railroad company for personal injuries, the refusal of an instruction that there is no evidence on which the doctrine of last clear chance can be based, was correct in view of evidence warranting the application of such doctrine, and, even if erroneously refused, the error was harmless in view of the fact that the jury did not find against appellant on the subject of last clear chance.

Louisville, etc., Traction Co. v. Lottich, 426, 436 (13).

91. *Urging Jury to Agree.*—The giving of an instruction urging the jury to agree on a verdict, stating that litigation is expensive and "the State expects you to do your duty conscientiously and faithfully", that the court has no right and is not attempting to ask any juror to yield his conscientious and settled convictions as to the evidence, "but that if this jury is being detained from a verdict by any one man or two men, then it is a matter for those in the minority * * * to seriously consider whether his or their own judgment might not be mistaken", that all business transactions "are done upon the theory of listening to, and, in proper cases, yielding to, the views of others, if they are sound or reasonably so", and that "In a civil case a jury should approach the solution of the question in that spirit and not in the spirit of controversy", etc., and should not "allow any outside considerations or motives to have any weight * * * except to be governed by the evidence as it has been detailed to you, and the instructions as the court has given them to you", and directing the jurors to retire and make an earnest effort to reconcile their views, was reversible error.

Picken v. Miller, 115, 120 (5).

(C) AS TO PLEADINGS.

92. *Demurrer to Answer.*—Where a special paragraph of answer to a cross-complaint seeking the enforcement of a mechanic's lien amounted merely to a denial of the authority of cross-complainants to furnish the material and perform the labor sued for, the court did not err in sustaining a demurrer thereto.

Rader v. A. J. Barrett Co., 27, 30 (3).

93. *Demurrer to Answer.*—*Sufficiency of Complaint.*—Where appellant complains of the overruling of his demurrer to a paragraph of answer, the court on appeal in reviewing such ruling will consider the sufficiency of the complaint to which the answer was addressed, even though the question of its sufficiency is not presented by the assignment of any cross error, and if the com-

APPEAL—Continued.

plaint is insufficient the overruling of such demurrer will be regarded as harmless. *State, ex rel. v. Reichard*, 338, 341 (1).

94. *Ruling on Demurrer to Answers.*—Where all the evidence that could be admitted as a defense to a petition for the confirmation of a settlement contract entered into between an administrator and a guardian was admissible under the general denial, there was no error in sustaining demurrers to paragraphs of special answer. *Fender v. Phillips*, 85, 94 (6).

95. *Review.—Ruling on Demurrer.—Memorandum.—Sufficiency.*—In an action for breach of warranty in the sale of a horse, a memorandum of defects accompanying a demurrer to the complaint, stating that the complaint shows no such warranty as under the facts would make defendant liable, that it does not show that plaintiff has done the things required of it in the premises, and that it shows no facts disclosing any liability on the part of defendant on account of any alleged warranty, was insufficient to enlighten the court as to the specific objections urged to the complaint, and hence the overruling of the demurrer was not error. *Blair Baker Horse Co. v. Railroad Transfer Co.*, 505, 507 (1).

96. *Ruling on Demurrer.—Briefs.—Sufficiency.*—Appellant's brief containing the substance of the complaint and the statement that "appellant demurred to the appellee's complaint on the ground that the same did not state facts sufficient to constitute a cause of action", followed by a citation of the page and lines of the record where the demurrer is to be found, together with the statement that "the demurrer to the complaint was overruled and appellant excepted to the ruling", and a citation of the page and lines where such ruling is to be found, substantially complies with the requirements of Rule 22, so as to present for review the questions raised by the assignment of error in the overruling of such demurrer. *Cleveland, etc., R. Co. v. Means*, 383, 387 (1).

97. *Pleading.—Presumptions.*—Where the record fails to show that any answer was filed to certain paragraphs of the complaint, or that a reply was filed to a special paragraph of answer, it will be presumed on appeal from the judgment that at least a general denial was filed to such pleadings.

Buffalo Specialty Co. v. Indiana, etc., Wire Co., 465, 468 (1).

98. *Questions Reviewable.—Ruling on Demurrer to Answer.*—No question can be presented on the overruling of a demurrer to a paragraph of answer in the absence of a memorandum of defects accompanying the demurrer.

Muncie Electric Light Co. v. Joliff, 349, 353 (2).

99. *Questions Reviewable.—Rulings on Demurrers.—Memorandum of Defects.—Scope of Review.*—The court on appeal may look beyond the grounds stated in the memorandum of defects to uphold the action of the lower court in sustaining a demurrer, but it will not look beyond such grounds to overthrow the overruling of a demurrer. *Boes v. Grand Rapids, etc., R. Co.*, 271, 276 (4).

(D) VERDICT, FINDINGS AND ANSWERS TO INTERROGATORIES.

100. *Verdict.—Conclusiveness.*—A general verdict supported by some evidence is conclusive on the question of the sufficiency of the evidence. *Cleveland, etc., R. Co. v. Means*, 383, 415 (18).

101. *Verdict.—Conclusiveness.*—Where a verdict is rendered on conflicting evidence, it is conclusive if there was no error in the giving or refusing of instructions.

Princeton Light, etc., Co. v. Ballard, 345, 347 (1).

APPEAL—Continued.

102. *Verdict.—Conclusiveness.*—A verdict can not be disturbed on the ground of insufficient evidence where it appears that there was evidence to support it upon every material question.

Blair Baker Horse Co. v. Railroad Transfer Co., 505, 509 (2).

103. *Verdict.—Presumptions.*—As against the jury's answers to interrogatories all reasonable presumptions are to be indulged in favor of the general verdict. *City of Gary v. Geisel*, 565, 569 (2).

104. *Verdict.—Answers to Interrogatories.*—Answers to interrogatories do not overcome the general verdict, where such answers, when considered in view of the presumption in favor of the general verdict, present no irreconcilable conflict with the general verdict.

W. McMillen & Son v. Hall, 545, 562 (17).

105. *Verdict.—Amount of Recovery.*—Reversal can not be predicated on the alleged excessiveness of the verdict, where appellant has neither pointed out in what manner the amount of recovery is too large, nor cited any authorities to sustain his point, and the facts and figures show that the amount of the finding was within the evidence heard by the jury.

Klitze v. Smith, 461, 465 (3).

106. *Verdict.—Evidence.*—Where plaintiff charged that defendant, as his agent, had procured a certain contract whereby a third person was to exchange lands with plaintiff, and that defendant had caused plaintiff to cancel such contract and had received \$1,500 for so doing, and sought to recover such sum from defendant, less a reasonable amount for commission; and the contracts in evidence, construed together, showed that defendant could not be held for a share of the profits unless the exchange of land was completed; and there was parol evidence that defendant was not plaintiff's agent, but that they were to be partners if the exchange was consummated, as well as the testimony of defendant that he did not cancel or procure the cancellation of the contract, and evidence showing that the \$1,500 received by defendant was for prior services rendered to the owners of the land held in the name of such third person, a verdict for defendant can not be disturbed.

Ervin v. Cline, 242.

107. *Verdict.—Entry of Remittitur.—Overruling Motion for New Trial.*—In an action for breach of warranty in the sale of a horse, where it appeared that the animal was purchased for \$147.50, that it was returned as not as represented, and sold for \$13, a verdict for \$175 was returned for plaintiff on a complaint averring no special damages, whereupon plaintiff remitted \$27.50 and judgment was entered for \$147.50, and that thereafter the court directed an additional remittitur of \$13, with the alternative that plaintiff suffer a new trial, and that the additional remittitur was made, he original judgment set aside, and a new judgment entered for \$134.50, there was no error in permitting the first remittitur or in directing the second, since if the cause had come to the court on appeal with an excessive judgment a remittitur could properly have been ordered.

Blair Baker Horse Co. v. Railroad Transfer Co., 505, 509 (3).

108. *Findings.—Conclusiveness.*—Findings of fact based on conflicting oral testimony are conclusive on appeal where there is evidence to support them. *Vermillion v. First Nat. Bank*, 35, 43 (1).

109. *Findings.—Conclusiveness.*—The court on appeal will not disturb the finding of the lower court if there is some evidence to sustain it.

Vincennes Traction Co. v. Curry, 683, 689 (2).

APPEAL—Continued.

110. *Findings.—Conclusiveness.*—Where the evidence is conflicting on the questions of fact as to which the finding of the trial court is challenged, the finding can not be disturbed.
American, etc., Tin Plate Co. v. Yonan, 700, 704 (6).
- 110½. *Findings.—Conclusiveness.*—Where the evidence, though by no means conclusive, was sufficient to make a case for the jury on the question of alleged fraud in procuring settlement with the beneficiary under a certificate on the life of her deceased husband, the finding of the jury thereon can not be disturbed.
Sovereign Camp, etc. v. Latham, 290, 305 (9).
111. *Findings.—Conclusiveness.*—The finding of the trial court that a certain defendant received notice of plaintiff's election to purchase certain property pursuant to an option thereon, was conclusive where there was not a total failure of evidence to prove such notice.
Bronnenberg v. Indiana Union Traction Co., 495, 499 (2).
112. *Findings.—Conclusiveness.*—For the purpose of determining the question raised by the exceptions to conclusions of law the finding of facts must be accepted as correct, hence the contention by appellant who was the wife of defendant in an attachment proceeding, that a conveyance of the land in which she joined, and which was made after the lien had attached but before the sale, was a nullity and the result of mutual mistake, etc., can not prevail where the findings do not support the contention that the deed was void and do not show any rescission or cancellation, but rather that there was a ratification thereof.
Little v. Mundell, 227, 234 (5).
113. *Findings.—Evidence.—Determining Sufficiency.*—In determining whether the findings of the trial court are supported by the evidence, the court on appeal will look only to that evidence most favorable to appellee, and if it supports such findings, or warrants an inference of the existence of the facts found, the findings are conclusive.
Muncie Electric Light Co. v. Joliff, 349, 354 (3).
114. *Findings.*—In an action for injunction and for damages resulting from the casting of surface water onto plaintiff's land, a finding for plaintiff can not be disturbed on the theory that the evidence shows that defendant had acquired a prescriptive right to discharge the water on plaintiff's land, where it is doubtful if the evidence shows more than a permissive use and the testimony is conflicting as to the number of years such use continued.
Vandalia R. Co. v. House, 10, 11 (1).
115. *Findings.*—In a suit to enjoin a landowner from interfering with the construction of plaintiff's line of electric transmission wires on a railroad right of way over defendant's land, where the railroad company was not the owner of the fee, it was without authority to grant plaintiff the right to construct its line on such right of way, so that a finding that as to such fee and the owner thereof the plaintiff stood in the relation of a trespasser was correct, though not essential to justify the conclusions stated against plaintiff. *Muncie Electric Light Co. v. Joliff*, 349, 357 (9).
116. *Findings.—Evidence.—Sufficiency.*—In a suit to enjoin a landowner from interfering with the construction of electric transmission wires on a railroad right of way across his land, where plaintiff alleged in its original complaint, which was verified, that the railroad company from whom it obtained leave to erect its line of wires owned a "right of way" over defendant's

APPEAL—Continued.

land, and the second paragraph of complaint contained a similar averment, such averments together with a deed introduced in evidence showing a conveyance of the land by the original owner, in which it was recited that the right of way "heretofore acquired by agreement of the grantor" was not included in the warranty, as well as other deeds tracing defendant's title back to such original owner, constituted sufficient evidence to warrant a finding that defendant was the owner in fee simple of the land embraced in the right of way subject only to the right of way or easement for railroad purposes.

Muncie Electric Light Co. v. Joliff, 349, 355 (4).

117. *Presenting Questions for Review.—Findings and Conclusions of Law.*—A special finding of facts and conclusions of law can be brought in review only by exceptions to the conclusions of law, but where appellant properly excepted to the conclusions and has properly presented the same by its assignment of errors, and has also attempted on its motion for new trial to raise the question that the decision of the trial court is contrary to law, stating in connection therewith that this ground for new trial raises the same question as the assignment of errors challenging the conclusions of law, the court will regard what appellant says under such ground for new trial as being also intended to challenge the correctness of the conclusions of law.

Muncie Electric Light Co. v. Joliff, 349, 358 (11).

118. *Answers to Interrogatories.—Complaint.*—In determining the sufficiency of the jury's answers to interrogatories to support a judgment thereon notwithstanding the general verdict, allegations in the complaint not covered by such answers must be considered as established by the proof and arrayed in support of the general verdict, and statements of conclusions therein should be treated as eliminated.

Eckhart v. Marion, etc., Traction Co., 217, 222 (5).

(E) HARMLESS ERROR.

119. Where appellant's complaint was insufficient to state a cause of action, intervening errors, if any, must be regarded as harmless.
State, ex rel. v. Retchard, 338, 344 (5).
120. *Admission of Evidence.*—Where a lease was recorded in a "lease record" instead of in the miscellaneous records of the county, appellant was not harmed by its admission in evidence, where the proof did not relate to the real matter in controversy and the facts proven thereby were not disputed and were substantiated by other proof so far as material to any issue in the case.
Louisville, etc., Traction Co. v. Lottich, 426, 436 (11).
121. *Admission of Evidence.*—In an action for personal injuries from collision with a street car, where a physician, in answer to a question asking him to state the extent of plaintiff's injury, testified that among other injuries the plaintiff had "an inguinal hernia on both sides", the action of the court in overruling a motion to strike out the quoted portion of the answer, on the ground that the complaint did not allege such injury, did not constitute harmful error, in the absence of any objection to the evidence upon the ground that defendant was not prepared to meet it, since the court could have ordered an amendment of the averments to permit such proof of hernia, and the court on appeal may treat such amendment as having been made.
Louisville, etc., Traction Co. v. Lottich, 426, 434 (10).

APPEAL—Continued.

122. *Instructions*.—Error in giving an erroneous instruction as to the measure of the damages recoverable can not work a reversal, even though the excessiveness of the damages was assigned as cause for a new trial, where appellant has waived such cause for new trial by failure to discuss it in the brief.
Sovereign Camp, etc. v. Latham, 290, 307 (11).
123. *Instructions*.—An instruction stating that if the jury find "under the instructions given" certain facts to be true, etc., though incorrect in the use of the quoted expression instead of advising that the finding must be from the evidence, was not fatally erroneous in view of other instructions clearly stating that the finding must be upon a fair preponderance of the evidence.
National, etc., Ins. Co. v. Wolfe, 418, 423 (4).
124. *Instructions*.—The giving of an instruction in an action for injuries received at a railroad crossing stating that in actions for damages on the ground of negligence as alleged certain things are essential to recovery, but omitting to mention the duty owing to plaintiff by the defendant, if erroneous because of such omission, was harmless where the undisputed facts were such as to impose on defendant the duty to give warning of the approach of its train to the crossing.
Pittsburgh, etc., R. Co. v. Macy, 125, 136 (10).
125. *Instructions*.—In instructing the jury that if it found that a certain speed ordinance was in force at the time of the injury to plaintiff, who was struck by a train alleged to have been operated at an unlawful speed, the plaintiff had a right to rely on the presumption that the defendant would not violate such ordinance, etc., the error, if any, in failing to tell the jury what was essential to show that the ordinance had been duly passed and was in force, was harmless, where it was admitted that there was no conflict in the evidence on that subject and appellant requested no instruction as to that matter.
Pittsburgh, etc., R. Co. v. Macy, 125, 139 (14).
126. *Refusal of Instructions*.—The refusal of an instruction correctly stating that the jury must take the law as given it by the court, and not from the argument of counsel, was not harmful error, where the court gave an instruction covering the point involved, though not in so comprehensive a manner as in the instruction requested. *Kokomo Brass Works v. Doran*, 583, 596 (9).
127. *Ruling on Demurrer to Answer in Abatement*.—The sustaining of a defective demurrer to an answer in abatement of a proceeding addressed to the probate jurisdiction of the court to procure the confirming of a contract of settlement, was harmless, where the answer in abatement failed to disclose any infirmity that was ground for abating the proceeding.
Fender v. Phillips, 85, 91 (2).
128. *Ruling on Demurrer*.—Even though the overruling of demurrers to special paragraphs of answer was error, on the ground that such answers set up matter within the rule that parol evidence can not be received to show that the consideration for a written contract was different from that expressed therein, or that there was no consideration, the error was harmless, where the court refused evidence as to negotiations prior to the making of the contract set out in plaintiff's complaint, and no evidence was offered to show a want of consideration.
Smith v. Frantz, 260, 265 (1).

APPEAL—Continued.

129. *Striking Out Petition of Intervener.*—Error, if any, in striking out a petition to intervene, was harmless, where it appeared that petitioner was not a necessary party and had no absolute right to intervene.

Forsyth v. American Maize Products Co., 634, 639 (5).

(F) ERROR WAIVED.

130. *Waiver of Error.*—*Briefs.*—Grounds for a new trial not presented or discussed in appellant's points and authorities are waived.

Ferdinand R. Co. v. Bretz, 123, 124 (1).

131. *Excessive Damages.*—*Waiver of Error in Instructions.*—In order to present any question as to error in the amount of recovery, it must be duly assigned as ground for new trial; hence, where such question is not thus presented, error in an instruction, objected to solely on the ground that it stated an erroneous measure of damages and enhanced the amount of the verdict, is deemed waived.

Pittsburgh, etc., R. Co. v. Macy, 125, 140 (17).

XI. DETERMINATION AND DISPOSITION OF CAUSE.**(A) AFFIRMANCE.**

132. Where the case seems to have been fairly tried on the merits, resulting in substantial justice between the parties, the judgment will be affirmed.

Bronnenberg v. Indiana Union Traction Co., 495, 500 (7).

133. Where an agreement unaided by extrinsic evidence was not susceptible of the interpretation placed thereon by plaintiff, and there was practically no evidence to show mutual mistake, the action of the trial court in denying a reformation of the instrument and refusing injunctive relief against its alleged violation, being in accord with the great weight of the evidence and the law applicable thereto, can not be disturbed.

Buffalo Specialty Co. v. Indiana, etc., Wire Co., 465, 470 (3).

134. *Excessive Damages.*—*Disposition of Cause.*—*Remittitur.*—While a determination on appeal that the damages are excessive affords ground for unconditional reversal, it does not necessitate such disposition of the cause, since, even though there is no definite standard for the measurement of the damages, the court may permit a remittitur of such amount as it may deem excessive and affirm the judgment on condition that such remittitur is made.

City of East Chicago v. Gilbert, 613, 632 (18).

135. *Intervening Error.*—Where it appears from the whole record that the cause was fairly tried and a correct result reached, errors of a technical character and not prejudicial to the substantial rights of appellant can not work a reversal.

National, etc., Ins. Co. v. Wolfe, 418, 425 (9).

(B) REVERSAL.

136. *Decree.*—*Failure to Provide Interest.*—Appellants are not entitled to a reversal of a decree for the specific performance of a contract to sell real estate, for failure to provide for the payment of interest, where no motion was made to modify the decree in that respect, and especially where it does not appear that their failure to receive the money from the purchaser was due to any fault of the latter, or that the purchaser used the money or derived any benefit from it.

Bronnenberg v. Indiana Union Traction Co., 495, 500 (5).

APPEAL—Continued.

137. *Record.*—The court on appeal does not search the record for causes on which to base a reversal.

Chicago, etc., R. Co. v. Roth, 161, 168 (7).

APPOINTMENT—

Of special judges, see JUDGES 1-3.

ASSIGNMENT OF ERRORS—

See APPEAL 36-45.

ASSUMPTION OF RISK—

See MASTER AND SERVANT 7-11.

ATTACHMENT—

1. *Filing Under.—Rights Acquired.*—Creditors may file under an original attachment proceeding as long as the same remains pending, and such underfiling claimants acquire the same lien and become entitled to all the rights of the original plaintiff.

Little v. Mundell, 227, 233 (2).

2. *Filing Under.—Effect.—Dismissal of Original Action.*—While the claim or complaint of each underfiling creditor is in a sense an independent action, it keeps alive the original writ of attachment and the levy made thereunder, even though there is a dismissal by the first attaching creditor.

Little v. Mundell, 227, 233 (3).

3. *Filing Under.—Dismissal of Original Action.—Conveyance by Debtor.—Subsequent Sale to Satisfy Attachment Lien.—Rights of Debtor's Wife.*—Although the wife of a debtor whose real estate has been levied on under a writ of attachment is entitled to one-third of such real estate as against the purchaser at a sale to satisfy the lien, where a debtor and his wife conveyed his real estate after the original writ of attachment had been levied thereon, and after a number of creditors had filed under in the original action, and then procured a dismissal of the original action, the liens of the creditors filing under had attached and were not affected by such dismissal, and the act of the wife in joining her husband in such conveyance was a waiver of her right to assert a one-third interest in the land as against the purchasers at a sale subsequently had to satisfy the liens of the creditors filing under.

Little v. Mundell, 227, 233 (4), 235 (4), 236 (4).

4. *Liens.—Priority.—Rights of Creditors Filing Under.*—The lien on property attached relates back to the time the writ of attachment was placed in the hands of the sheriff, and the claims of all attaching creditors, including those who have properly filed under, are liens from the time the original writ was placed in the hands of such officer, and take priority over subsequent judgments and mortgages, and this is so even though the underfiled claims were not in fact filed until after such mortgage was executed or judgment rendered.

Little v. Mundell, 227, 232 (1).

AUTOMOBILE—

Injury to guest in, see NEGLIGENCE 21, 22.

BILL OF EXCEPTIONS—

See APPEAL 63.

Failure to file, in time, see APPEAL 35.

BILLS AND NOTES—

1. *Delivery.—Evidence of Possession.*—Proof of possession by the payee of a note at the time of trial is sufficient to make a *prima facie* case of delivery at the date of its execution, or at least, within the lifetime of the payor. *Deeter v. Burk*, 449, 459 (7).
2. *Delivery.—Evidence.—Possession by Payee.*—Possession of a note in the hands of a payee in and of itself imports either an actual or constructive delivery by the payor to him, or at least imports that the payee's possession is with the knowledge and consent of the payor, and gives rise to the presumption in favor of that inference which imports good faith and right conduct.
Deeter v. Burk, 449, 459 (6).
3. *Execution.—Evidence.*—Where the execution of a promissory note is in issue, no presumptions are indulged in its favor and the burden of proof is upon the party seeking to recover, but a *prima facie* case of execution is made by proof of the signing of the note together with the possession of the note by the payee or his attorney and its introduction in evidence.
Deeter v. Burk, 449, 456 (4), 457 (4), 459 (4).
4. *Form.—Consideration.—Evidence.*—A promissory note, though not negotiable under the law merchant, and not containing the words "for value received", is negotiable by virtue of §9071 Burns 1914, §5501 R. S. 1881, and imports a consideration, so that the evidence will support a verdict for plaintiff in an action thereon without any evidence as to consideration other than the instrument itself.
Deeter v. Burk, 449, 460 (8).
5. *Negotiability.—"Value Received"*—The words "value received" are not essential to the negotiability of a note, unless they are required by statute.
Deeter v. Burk, 449, 460 (9).
6. *Payment.—Acceptance of Forged Note.*—The debt evidenced by a note secured by mortgage is not discharged by the acceptance in its stead, with the belief that it is genuine, of a new note for a greater amount, and bearing the name of a solvent and sufficient surety, when in fact such new note is a forgery.
McConnell v. American Nat. Bank, 319, 323 (2).
7. *Payment.—Recovery of Payment.—Cancellation of Note.*—On a complaint to recover money paid and to cancel a note executed by plaintiffs, alleging that a commission firm had arranged with defendant bank to advance money for live stock purchased for it by the plaintiffs, and in doing the business the bank required plaintiffs to make a draft on the commission firm for the amount advanced by the bank on each purchase, that plaintiffs did not understand that they assumed any liability by so doing, that on dishonor of one of the drafts the bank insisted on payment by plaintiffs and to that end held up the personal funds of plaintiffs, and that thereupon plaintiffs, under mistake as to their legal rights, paid part of the draft in cash and executed their note for the balance, no such mistake, fraud, duress or coercion was shown as would entitle plaintiffs to the recovery of the money paid on such draft, or to a cancellation of the note executed for the balance.
Parker v. First Nat. Bank, 189, 192 (1), 194 (1).

BONDS—

Liability on, see GUARDIAN AND WARD 2, 3.

Liability of sureties on official, see OFFICERS 2.

BRIDGES—

1. *Duty to Repair.—Official Discretion.*—While the duty to repair bridges is in a sense absolute, yet in the very nature of the case there is room for the exercise of official discretion as to the character and extent of the repairs to be made, and the time when they should be made, etc., all of which must of necessity depend on the importance of the bridge when measured by the frequency and nature of the use to which it is subjected.
Lamphier v. Karch, 661, 666 (5).
2. *Highways.—Title of State and Local Subdivisions.—Repairs.*—Public highways are established and opened, and bridges as a part thereof are built, pursuant to legislative authority, and, in the absence of statutory provision to the contrary, the ownership of such public ways is in the State at large rather than in the local subdivisions; hence the duty of making repairs, though discharged through proper boards and officers of the local subdivisions, rests fundamentally on the State, and such agencies in the discharge of such duty are in fact the agencies of the State.
Lamphier v. Karch, 661, 665 (4).
3. *Injuries from Defects.—Liability of Officers.*—Considered in the light of existing statutory provisions and declared rules of law relative to the maintenance and repair of highways and bridges, any obligation resting on a township trustee and road supervisor to repair a bridge is in the nature of a duty owing to the State or public at large, rather than to individuals distributively, and such officials are not liable in their personal capacity in an action to recover damages for injury to a horse resulting from a mere failure to repair a bridge.
Lamphier v. Karch, 661, 662 (1), 663 (1), 665 (1), 666 (1).

BREACH—

See INSURANCE 24, 25.

BRIEFS—

See APPEAL 2, 39, 46-59, 96, 130.

BURDEN OF PROOF—

See APPEAL 84; INJUNCTION 1, 2; MUNICIPAL CORPORATION 15; RAILROADS 11.

BY-LAWS—

See INSURANCE 17, 19, 21, 22.

CANCELLATION—

See INSURANCE 15, 29; MORTGAGES 9, 10.

Of note, see BILLS AND NOTES 7.

Of record, see MORTGAGES 4.

CARRIERS—

1. *Carriage of Live Stock.—Action for Injuries.—Complaint.*—A complaint alleging the delivery to defendant express company of a hog, the payment of the charges for transportation to a named destination, the undertaking by defendant to carry the hog safely and deliver the same to plaintiff, the delivery of the hog by defendant to its codefendant, another express company, and negli-

CARRIERS—Continued.

gence in the carriage and treatment of the hog by defendants which caused its death while in their possession, was sufficiently clear and specific and stated a good cause of action upon the theory of the breach of the common-law duty of a carrier.

Adams Express Co. v. Welborn, 330, 332 (1).

2. *Carriage of Live Stock.—Limitation of Liability.*—Where the court found that plaintiff's agent on delivering a hog for transportation from a point in Illinois to a point within this State, entered into a contract of limited liability in which it was stated that defendant's charges are fixed by and based upon the value of the animal as declared by the shipper, etc., and which on its face showed that the shipper was free to place any value that he might choose upon the animal, and there was no finding that any limitation was placed upon the value which he might declare, the court erred in its conclusion that the limitation of the liability was void; hence the plaintiff was not entitled to recover for the loss of the hog a sum greater than the valuation fixed in such contract, notwithstanding the fact that at the time the contract was entered into the defendant's agent demanded that plaintiff's agent ship the hog upon the conditions set out in the contract and neither had authority to give, nor gave, plaintiff's agent an opportunity to ship without a limitation of liability.

Adams Express Co. v. Welborn, 330, 333 (3), 335 (3).

3. *Duty to Passengers.—Street Railroads.*—The rule which requires a carrier to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its road, applies to street railroads.

Vincennes Traction Co. v. Curry, 683, 692 (9).

4. *Ejecting Passenger.—Pleading.—Answer.*—In a passenger's action for damages for being ejected from defendant's car, an answer admitting that plaintiff tendered a proper ticket which defendant accepted, and seeking to justify the ejection on the ground that plaintiff was a through passenger, who sought to avoid paying the scheduled rate of fare by paying his fare in cash to a certain stop under pretense that such stop was his destination, and that on arrival at such stop he stepped from the car and immediately reentered it, and tendered the ticket which defendant's conductor accepted, at the same time demanding extra fare which plaintiff refused to pay, amounted to an argumentative denial, and the affirmative matter pleaded was provable under the general denial, so that there was no error in sustaining a demurrer thereto.

Terre Haute, etc., Traction Co. v. Hornaday, 207.

5. *Injury to Passenger.—Alighting from Moving Train.—Contributory Negligence.*—It is not negligence *per se* for a passenger to alight from a slowly moving train, and, though there are circumstances where it may be said as a matter of law that a person in thus alighting is or is not guilty of contributory negligence, the question of one's contributory negligence in such case is ordinarily one of fact for the jury to determine.

Chicago, etc., R. Co. v. Collins, 572, 578 (3).

6. *Injury to Passengers.—Alighting from Moving Train.—Contributory Negligence.*—Where the undisputed facts taken with such of the disputed facts as are most favorable to plaintiff, lead inevitably and certainly to the conclusion that a person of ordinary prudence would not have leaped from the train, it is the

CARRIERS—Continued.

duty of the court to pronounce the plaintiff guilty of contributory negligence as a matter of law.

Chicago, etc., R. Co. v. Collins, 572, 580 (5).

7. *Injury to Passengers.—Alighting from Moving Train.—Contributory Negligence.*—Ordinarily in determining whether a passenger is guilty of contributory negligence in alighting from a moving train, the speed of the train, the presence or absence of light, the place of alighting, whether the passenger is induced, invited or ordered by the trainmen to get off the train, whether there is any real or apparent emergency of peril to be met, the age and physical condition of the passenger, etc., are merely facts for the consideration of the jury.

Chicago, etc., R. Co. v. Collins, 572, 580 (4).

8. *Injury to Passenger.—Alighting from Moving Train.—Contributory Negligence.*—Plaintiff, a girl of twenty years, was guilty of contributory negligence as a matter of law, where it appeared from the evidence most favorable in her behalf, that while riding as a passenger on defendant's train, she leaped from the train into the darkness, impelled by the mere fear that she would be carried beyond her destination, and without any knowledge as to whether the train would stop, and while it was traveling at from eight to ten miles per hour, and that there was nothing to show that she was induced or invited into a place of danger, or that she found herself facing any threatened peril.

Chicago, etc., R. Co. v. Collins, 572, 581 (6).

9. *Injuries to Passengers.—Collision of Street Car with Train.—Concurrent Negligence.—Liability.*—Where a passenger on a street car is injured in a collision with a train, caused by the concurrent negligence of the railroad and street car companies, he may recover from either or both, and neither can interpose the defense that prior or concurrent negligence of another contributed to the injury.

Vincennes Traction Co. v. Curry, 683, 691 (6).

10. *Injuries to Passengers.—Collision.—Negligence of Steam Road.—Liability.*—Where the negligence of a railroad company is the sole cause of the death of a street car passenger in a collision of the street car with one of its trains, there can be no recovery against the street car company.

Vincennes Traction Co. v. Curry, 683, 691 (8).

11. *Injuries to Passengers.—Collision.—Negligence of Steam Road.*—Where a street car company, whose track crossed at grade over the track of a steam railroad, was guilty of negligence which was the proximate cause of the death of a passenger in a collision of its street car with a train on the steam road, it can not avoid liability because of concurrent negligence on the part of the railroad company.

Vincennes Traction Co. v. Curry, 683, 690 (4).

12. *Injuries to Passengers.—Collision.—Crossing Railroad Track.—Negligence.—Contributory Negligence.*—Evidence showing that the motorman and conductor in charge of a street car did not stop the car and look and listen for an approaching train before attempting to cross a railroad track, when measured by the well-settled rules of law, was sufficient to convict them of negligence proximately contributing to the death of a passenger in the street car at the time of the resulting collision, and, in view of a finding to the contrary, it can not be said that decedent was guilty

CARRIERS—Continued.

of contributory negligence in attempting to alight from the car after he discovered the danger.

Vincennes Traction Co. v. Curry, 683, 692 (11).

13. *Injury to Passengers.—Negligence.—Jury Question.*—In an action for the death of a street car passenger in collision of the street car with the train of a railroad company, where the evidence as to the manner in which both the street car and the train approached the crossing, and as to conditions surrounding the crossing, etc., was such as to be reasonably susceptible to different conclusions and inferences on the question of negligence on the part of the street car company, the question of whether it was negligent was for the jury and its finding thereon is conclusive.

Vincennes Traction Co. v. Curry, 683, 692 (10).

14. *Injuries to Passengers.—Negligence.—Evidence.*—Evidence that plaintiff, a girl twenty years old, was riding as a passenger on defendant's train, which was crowded with people to such an extent that passengers were standing in the aisles and on the platforms of the cars; that the train arrived at the station where plaintiff desired to alight at nine o'clock at night and stopped so that the coach in which plaintiff rode was south of a cattle-guard and wing fence south of the station platform; that the station was not called; that fifty passengers left the train which stood at the station about three minutes; that, on learning that the station was the one at which she desired to alight, plaintiff proceeded to crowd herself down the aisle to the platform, which was crowded with passengers; that as she reached the door the train started; that she stepped down upon the platform steps and, noticing the wing fence, believed the train would stop, and thinking that its speed was slackening, stepped down a step; and that, on realizing that it was passing the depot and would not stop, and believing that it was going slow enough, she jumped and was injured; was sufficient to warrant the submission of the case to the jury on the issue of defendant's negligence.

Chicago, etc., R. Co. v. Collins, 572, 575 (1).

15. *Interstate Commerce.—Limitation of Liability.*—The Carmack amendment to the Hepburn Act (§20 Act of June 29, 1906, 34 Stat. at Large 584, Chap. 3,591; U. S. Comp. Stat. Supp. 1911 p. 1,288), though superseding all state laws on the subject of the liability of common carriers for loss or damage to interstate shipments, does not specifically refer to agreements limiting the liability of a carrier to an agreed valuation, so that the validity of such agreements is to be determined by the common law as declared by the Federal Courts.

Adams Express Co. v. Welborn, 330, 334 (4).

16. *Interstate Commerce.—Limitation of Liability.—Common-Law Rule.*—Under the common-law rule as declared by the Federal Courts, a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk; and the valuation so declared or agreed upon is conclusive in an action to recover a greater sum for loss or damage to the shipment.

Adams Express Co. v. Welborn, 330, 334 (5).

CASES—**DISTINGUISHED:**

- Bessler v. Laughlin*, 168 Ind. 38, see *Kokomo Brass Works v. Doran*, 583, 592 (7).
- Blair Baker Horse Co. v. Railroad Transfer Co.*, 59 Ind. App. 505, see *Boes v. Grand Rapids, etc.*, R. Co., 271, 276 (6), 278 (6).
- Butcher v. Greene*, 50 Ind. App. 692, see *Lamar v. Farmer*, 501.
- Cook v. Ormsby*, 45 Ind. App. 352, see *Kokomo Brass Works v. Doran*, 583, 592 (7).
- Davis v. Mercer Lumber Co.*, 164 Ind. 413, see *Kokomo Brass Works v. Doran*, 583, 592 (7).
- Evansville Hoop, etc., Co. v. Bailey*, 43 Ind. App. 153, see *Kokomo Brass Works v. Doran*, 583, 592 (7).
- King v. Inland Steel Co.*, 177 Ind. 201, see *Kokomo Brass Works v. Doran*, 583, 592 (7).
- Spiro v. Robertson*, 57 Ind. App. 229, see *Boes v. Grand Rapids, etc.*, R. Co., 271, 276 (6), 278 (6).
- State, ex rel. v. Bartholomew*, 176 Ind. 182, see *Boes v. Grand Rapids, etc.*, R. Co., 271, 276 (6), 278 (6).
- State, ex rel. v. Walford*, 11 Ind. App. 392, see *State, ex rel. v. Reichard*, 338, 343 (4).
- Stiles v. Hasler*, 56 Ind. App. 88, see *Boes v. Grand Rapids, etc.*, R. Co., 271, 276 (6), 278 (6).
- Tucker v. State*, 163 Ind. 403, see *State, ex rel. v. Reichard*, 338, 343 (4).

CHANGE OF NAMES—

See APPEAL 26.

CHANGE OF VENUE—

See VENUE 1, 2.

CHATTEL MORTGAGES—

1. *Fraud Against Creditors.—Fraudulent Intent.*—Under §7479 Burns 1914, §4920 R. S. 1881, relating to conveyances or assignments of goods made with intent to hinder, delay or defraud creditors, fraudulent intent is a question of fact, and, while such intent may be inferred from facts and circumstances proven, the court or jury trying the issue must draw the inference, and find the existence of the ultimate fact, in order that it may be said that fraudulent intent has been established; hence where the facts were specially found, and there was no finding of the ultimate fact of fraudulent intent, the chattel mortgages involved can not be held void as in fraud of creditors.
Vermillion v. First Nat. Bank, 35, 45 (4).
2. *Remedies of Creditors.—Disposition of Proceeds.*—Where, in determining the amount that should, as against creditors, be deemed to have been applied on the mortgage debt out of the proceeds arising from the sale of merchandise in regular course of trade, the court found that the mortgagor's wife performed services in the selling of the merchandise, nothing could be deducted therefor, from the amount that must be deemed to have been applied on the debt, in the absence of any finding as to what her services were worth. *Vermillion v. First Nat. Bank*, 35, 50 (7).
3. *Remedies of Creditors.—Disposition of Proceeds.*—Where chattel mortgages covering a stock of merchandise provided that the

CHATTEL MORTGAGES—Continued.

mortgagor should apply the proceeds from the sale of goods less the cost and expense of carrying on the business, to the payment of the mortgage debt, and the court found that in the period intervening between the execution of the two mortgages the mortgagor purchased fixtures, but failed to find that they were reasonably necessary, and the terms of the latter mortgage were broad enough to include such fixtures as a part of the mortgaged property, and such fixtures, subject to the mortgage lien have passed into the hands of the trustee for other creditors, substantial justice requires that they be treated as a part of the general fund to be equitably distributed.

Vermillion v. First Nat. Bank, 35, 52 (8).

4. *Remedies of Creditors.—Disposition of Proceeds.*—Where mortgages covering a stock of merchandise contained provisions for the application of proceeds from the sale of goods in regular course of trade to the replenishing of the stock and, after deducting the cost and expense of making the sales, to the payment of the notes, the proceeds not used in replenishing the stock, less the cost and expense of making the sales, will be regarded, as against creditors, as having been applied to the payment of the notes, regardless of whether they were actually so applied; and in determining the amount that should be regarded as applied on the notes, where the mortgagor personally transacted the business of the store, the value of his services are to be included as a part of the cost and expense of making the sales, but any portion of the proceeds used by him for living expenses over and above the value of his services must be deemed as having been applied on the mortgage debt.

Vermillion v. First Nat. Bank, 35, 47 (6), 50 (6).

5. *Rights of Creditors.—Validity.*—Chattel mortgages executed for no other purpose than to secure and procure the payment of the valid claims of the mortgagee are not void by reason of the fact that their existence operates to delay and hinder other creditors, but to render them void for such reason it must appear that the hindering and delaying resulted from a fraudulent intent of the parties to the instrument.

Vermillion v. First Nat. Bank, 35, 43 (2).

6. *Stock in Trade.—Reservation of Right to Sell.*—Chattel mortgages covering a mercantile stock are not invalid by reason of provisions giving the mortgagor the right to retain possession of the mortgaged goods and to sell in the usual course of trade, requiring him to account to the mortgagee for such sales, and, after deducting the cost of making the sales, to apply the proceeds on the debts secured, and also authorizing the investment of a sufficient amount of the proceeds in new goods to keep the stock in salable condition.

Vermillion v. First Nat. Bank, 35, 44 (3).

7. *Validity.—Secret Trusts.*—Under §7480 Burns 1914, §4921 R. S. 1881, providing that transfers or assignments of goods made in trust for the use of the person making the same shall be void as against creditors, the existence of a trust must be found as a fact, and, when so found, the law draws the inference of fraud, but chattel mortgages covering a stock of merchandise, valid on their face and containing nothing to warrant the inference of a secret trust, can not be held void under such section, where the court's finding of facts included neither a finding of the existence of such a trust, nor facts from which it might be inferred.

Vermillion v. First Nat. Bank, 35, 45 (5).

CHILD—

Injuries to children on tracks, see RAILROADS 33-35.

CLAIMS—

Against estates, see EXECUTORS AND ADMINISTRATORS 1-3.

Settlement of, see EXECUTORS AND ADMINISTRATORS 5, 7, 8.

COLLATERAL ATTACK—

See CORPORATIONS; JUDGMENT 1, 2.

COLLISION—

On streets, see NEGLIGENCE 1, 2.

Of street car with train, see CARRIERS 9-12.

COMMON-LAW ACTION—

See MASTER AND SERVANT 12.

COMMON-LAW RULE—

Limiting liability, see CARRIERS 16.

COMPLAINT—

See PLEADING.

COMPOSITIONS WITH CREDITORS—

1. *Essentials.—Secret Preferences.*—Where creditors unite in a composition agreement with their common debtor, the utmost good faith must be observed by all the parties, and any secret promise by the debtor to a creditor to pay him more than the others is void.
Citizens Nat. Bank v. Kerney, 96, 104 (4).

2. *Secret Agreements.—Admissibility of Parol Evidence.*—In an action involving the question of whether a note in question was executed by plaintiff's decedent as a secret preference in effecting a composition with creditors, parol testimony of negotiations had with defendant prior to the execution of the composition agreement showing that the execution of the note was requested by defendant as a condition for its acceptance of the composition settlement, as well as testimony of admissions subsequent to the execution of the note, to the effect that it was a preference, was admissible notwithstanding the written composition agreement had been executed some time prior to the execution of such note.
Citizens Nat. Bank v. Kerney, 96, 108 (6), 110 (6).

3. *Secret Preferences.—Evidence.—Sufficiency.*—Where the only question involved was whether a note executed by appellee's decedent to the appellant was void as having been executed as a secret preference in effecting a composition with decedent's creditors, appellant's contention that there was no evidence to warrant the trial court's finding that the note was executed as a secret preference can not be sustained, notwithstanding appellant has in its favor the presumption of good faith and the inhibition of the law against the presumption of fraud, where it conclusively appears from the facts disclosed by the note, the composition agreement, and other papers connected with the transaction, that decedent borrowed a sum from appellant with which to effect the composition; that the note was given to appellant for a part of its claim not included in the composition settle-

COMPOSITIONS WITH CREDITORS—Continued.

ment; that on the day of accepting the settlement under the composition, though subsequent to such acceptance, appellant took decedent's agreement to execute the note in question, etc., and especially in view of the testimony of decedent's sons to the effect that the president of defendant bank would not sign the composition agreement without an understanding that the note would be executed, and to the effect that the execution of a new note in its stead was later demanded of decedent because the note in question was not available.

Citizens Nat. Bank v. Kerney, 96, 105 (5), 111 (5).

CONCLUSIONS OF LAW—

See APPEAL 117.

CONCLUSIVENESS—

See APPEAL 15, 29, 100-102, 108-112; JUDGMENT 5, 6; VENDOR AND PURCHASER.

CONCURRENT NEGLIGENCE—

See CARRIERS 9; NEGLIGENCE 6.

Of fellow servant, see MASTER AND SERVANT 22.

CONDITIONS PRECEDENT—

See SPECIFIC PERFORMANCE 1.

CONSIDERATION—

See BILLS AND NOTES 4; CONTRACTS 2.

Failure of, see CONTRACTS 1.

CONSTITUTION—

See INSURANCE 17.

CONSTRUCTION—

See STATUTES 1, 2; WILLS 1-3.

Of policy, see INSURANCE 5.

CONTRACTS—

See INSURANCE 16, 17; MUNICIPAL CORPORATIONS 3; RAILROADS 39.

Impairment of, see MASTER AND SERVANT 20.

To sell real estate, see SPECIFIC PERFORMANCE 2.

1. *Action.—Failure of Consideration.—Pleading.—General Denial.*

—As a general rule want of consideration must be pleaded in order to be available as a defense, but where the complaint sets out the consideration for the contract sued on and makes the contract an exhibit, and the contract sets out the consideration, evidence of want of consideration is admissible under the general denial.

Smith v. Frantz, 260, 265 (3).

2. *Consideration.—Parol Evidence.*—Where the consideration is contractual, the consideration mentioned in a written contract can not be varied by parol evidence. *Smith v. Frantz*, 260, 265 (2).

3. *Construction.—Construction by Parties.*—The construction placed by the parties on an ambiguous contract, and acted upon by them, is entitled to great weight, and, if reasonable, will be

CONTRACTS—

adopted by the court, even though the court might probably adopt a different construction were it not for the practical construction already given by the parties. *Smith v. Frantz*, 260, 269 (5).

4. *Construction by Parties.—Evidence.—Instructions.*—In an action by the purchaser of land against a tenant involving his right to a corn crop planted and matured subsequent to his execution of a contract to surrender on September 1, 1910, his lease which expired in 1911, where the contract was not clear and no mention was made as to what crops might be raised during the year 1910, evidence showing that the parties, other than plaintiff, understood that the contract was merely to permit plaintiff the use of the farm in 1911 and the right to sow wheat in 1910, and that defendant was to have the right to harvest the corn raised by him in 1910, and that plaintiff himself so understood the contract until October 21, 1910, and had permitted defendant to plant and cultivate the corn without, objection, was properly submitted to the jury under instructions that defendant had a right to the corn if he planted and cultivated it with the knowledge and consent of plaintiff and with the understanding that he had a right to do so under the lease from plaintiff's grantors, and informing the jury fully and correctly as to the rights of both the owner of the land and the tenant where crops are planted which can not be harvested before the expiration of the tenancy, etc.

Smith v. Frantz, 260, 265 (4), 270 (4).

5. *Death of Party.—Effect.*—Ordinarily the death of either party to a contract does not extinguish it, unless it is of a personal character and not susceptible of performance by the personal representative of such deceased party; and in determining whether it may be performed by such representative regard must be had both to the nature of the transaction and the language in which the contract is couched. *Miller v. Ready*, 195, 201 (4).

6. *Termination by Death.—Leases.*—An ordinary lease of real estate is not such a personal contract as is annulled or extinguished by the death of either party thereto.

Miller v. Ready, 195, 202 (5).

7. *Validity.—Evidence.*—Where there was evidence to show that both parties to the contract sued on understood what was intended by its terms, and that plaintiff had partly performed, and there was also evidence tending to show how both parties had construed the contract as affecting such part performance, the evidence was sufficient to enable the trial court to ascertain all the essential elements, terms and conditions of such contract to which the parties intended to bind themselves, and hence sufficient to support the court's decision thereon.

American, etc., Tin Plate Co. v. Yonan, 700, 704 (5).

8. *Written Contracts.—Parol Evidence.—Admissibility.*—Parol evidence can not, as a general rule, be received to vary or contradict the terms of a written contract, or to show that the consideration, if contractual in character, is other than that expressed; but such rule has no application where the contract was procured by fraud or resulted from the mutual mistake of the parties, or where the contract was tainted with fraud in its inception and in the negotiations leading up to its making.

Citizens Nat. Bank v. Kerney, 96, 109 (7).

CONTRIBUTORY NEGLIGENCE—

See **ANIMALS**; **CARRIERS** 5-8, 12; **MASTER AND SERVANT** 5; **MUNICIPAL CORPORATIONS** 15-18; **NEGLIGENCE** 1, 7, 14, 22, 23; **RAILROADS** 10-18, 22, 29, 33, 36; **STREET RAILROADS** 7-9.

CONVEYANCES—

By debtor, see **ATTACHMENT** 3.

A wife, by joining her husband in a valid and effective deed extinguishes her inchoate interest in the land conveyed, see **HUSBAND AND WIFE**.

CORPORATIONS—

Process.—Service by Publication.—Collateral Attack.—The rule that in order to procure valid service on a corporation by publication a summons must first have been issued and a return made by the sheriff thereon disclosing that the corporation had no officer or person authorized to transact its business upon whom process could be served, is not available in a collateral attack on a decree of foreclosure rendered against a corporation by default on service by publication. *Frankel v. Voss*, 175, 179 (1).

COSTS—

See **APPEAL** 31-34.

COURTS—

Records.—Filling Blanks.—The law provides an adequate way for correcting records, and the mere fact that blank spaces are left in a record does not warrant the changing of the record by filling such spaces without authority from the court.

Ripley v. Baldwin, 77, 79 (2).

CREDITORS—

Fraud against, see **CHATTEL MORTGAGES** 1.

Remedies of, see **CHATTEL MORTGAGES** 2-4.

CROSSINGS—

See **RAILROADS** 43.

Over steam roads, see **STREET RAILROADS** 3, 4.

Accidents on, see **RAILROADS** 4-25; **STREET RAILROADS** 1, 2.

DAMAGES—

See **DEATH** 1, 4; **MALICIOUS PROSECUTION** 3; **RAILROADS** 30.

Excessive, see **APPEAL** 70.

Measure of, see **APPEAL** 72.

Appeal on question of, see **MUNICIPAL CORPORATIONS** 8-10.

1. *Excessive Verdict.—Review.*—Where plaintiff, a married woman fifty-six years of age, was injured by a fall, and it was shown that, though no bones were broken, she suffered severe pain in her right knee and leg and about her body in the region of the right kidney, that she was thereby confined to her bed for ten days and to the house for several months, under the regular care of a physician, that for about six months she was required to use crutches, that while the injury to the kidney did not materially interfere with the functions of the organ, it produced

DAMAGES—Continued.

constant pain and a nervous condition, that the percentage of cures of such injuries is small, that the injury to the knee was probably permanent, and that she had lost weight and was unable to do all her housework, a verdict awarding her damages in the sum of \$6,000 was excessive.

City of East Chicago v. Gilbert, 613, 630 (17), 631 (17).

2. *Personal Injuries.—Excessive Damages.*—Where the evidence in a personal injury case showed that plaintiff, who was sixty-eight years of age, was a man of business capacity, strong and active prior to the injury, and that the injury had affected his nervous system and was permanent in character, an allowance of damages in the sum of \$5,000 was not so great as to warrant the setting aside of the verdict on the ground of excessive damages.
Chicago, etc., R. Co. v. Roth, 161, 168 (6).

3. *Personal Injuries.—Measure of Damages.—Peril to Life.—Instructions.*—In an action for injuries sustained in a railroad crossing accident, while it was error in an instruction setting out the elements of damages to state that damages might be awarded for the peril to plaintiff's life, if any was shown, etc., was harmless, where the evidence showed that plaintiff had a life expectancy of nine years and had an earning capacity of about \$2,000 per year, that his salary was wholly lost for a period of seven months, and that his health was permanently injured and his earning capacity greatly reduced, and the amount of the verdict, which was for \$2,500, was not questioned in any way.
Pittsburgh, etc., R. Co. v. Macy, 125, 139 (16).

DANGER—

Knowledge of, see NEGLIGENCE 7.

DEATH—

Of party, see CONTRACTS 5.

1. *Action for Wrongful Death.—Emancipated Minor.—Right of Recovery.—Complaint.*—Where the complaint, in an administrator's action to recover for the wrongful death of an emancipated minor, alleged that decedent contributed to the support of his parents and brothers and sisters, that all of said brothers and sisters were dependent on him for support, etc., and that by reason of his death the decedent's parents and brothers and sisters had been damaged in the sum named, it was sufficiently shown as a matter of pleading that such persons had a right to expect that the contributions would continue for a time at least, and that they had a right to expect that decedent so intended.

Vandalia Coal Co. v. Bland, 308, 317 (5).

2. *Damages.—Excessive Verdict.*—A verdict of \$1,500 in an action for the benefit of the parents as the next of kin of decedent was not excessive in view of evidence showing that decedent contributed \$10 per week to the support of his parents, that he was not at home excepting on Saturdays and Sundays and occasionally was not at home on some of those days, and that he was a young man twenty-three years of age with a life expectancy of 39.31 years, while that of his father and mother was 19.63 and 24.46 years respectively, and in the absence of anything to show that the amount of the verdict was influenced by prejudice, passion or corruption.

Vincennes Traction Co. v. Curry, 683, 692 (13).

DEATH—Continued.

3. *Pecuniary Loss.—Evidence.—Sufficiency.*—Where the evidence showed that decedent, an unmarried man of twenty-three years, had since the time of his employment contributed to the support of his father and mother the sum of \$5 per week, and during the last two years of his life the sum of \$10 per week, that he was not at home excepting on Saturdays and Sundays and would occasionally be away for two or three weeks without returning home at all, and that he had a life expectancy of 39.31 years, while the life expectancy of his father and mother was 19.68 and 24.46 years respectively, the finding of the court that the parents had suffered a pecuniary loss by reason of the son's death was not unwarranted.

Vincennes Traction Co. v. Curry, 683, 692 (12).

4. *Verdict.—Damages.—Pecuniary Loss.*—In an action for the death of a person killed by a train at a crossing, answers by the jury to interrogatories that there was "no evidence" as to what was the actual pecuniary loss to decedent's children by reason of decedent's death, and as to what the items, if any, of such pecuniary loss were, were not equivalent to a finding that there was no pecuniary loss, and were not in conflict with the general verdict for plaintiff. *Lutz v. Cleveland, etc., R. Co.*, 16, 25 (6).

DEDICATION—

For highway, see RAILROADS 43.

Of land for highway, see HIGHWAYS 1.

To public use, see RAILROADS 19.

DEEDS—

See EASEMENTS 1.

DEFAULT—

Order setting aside, see APPEAL 5.

DEMAND—

Necessity for notice or, see SPECIFIC PERFORMANCE 1.

DEMURRER—

See PLEADING 7, 8.

DILIGENCE—

Necessary on part of Intervener, see PARTIES 2.

DISCRETION OF COURT—

See NEW TRIAL 1.

Confirmation of settlement entered into between an administrator with the will annexed and the guardian of an insane legatee is largely in the, see EXECUTORS AND ADMINISTRATORS 3.

DISMISSAL—

See APPEAL 30, 60-64; MUNICIPAL CORPORATIONS 8-10.

Of action by party in vacation requires action by the court at the next term to complete such dismissal, see ACTION.

DUES—

To relief associations, see RAILROADS 40.

EASEMENTS—

1. *Action.—Parties.—Deeds.—Construction.*—Where an intervenor's rights in a harbor and plaintiff's easement for a pipe line therein all rest in a grant by deeds from the owners of the adjoining real estate, the court, in passing upon the question of whether intervenor is a necessary party, must consider all the deeds for the purpose of determining the rights of the parties and ascertaining whether they convey inconsistent privileges, or whether the several rights granted may coexist without any necessary conflict.

Forsyth v. American Maize Products Co., 634, 638 (3).

2. *Action.—Parties.—Privilege to Dredge Harbor.—Easement to Extend Pipe Line.—Intervention.*—Where plaintiff sued to enjoin an interference with its right to extend a pipe line which it maintained under the bed of a harbor, and it appeared that dredging privileges belonging to one seeking to intervene imposed no obligation, except in relation to the preservation and protection of the harbor in the event the work was undertaken, and that in the event such dredging were undertaken that the pipe line could be lowered so as not to interfere, that neither the public nor the intervenor's privileges were affected by the presence of the pipes, there was no necessary conflict between plaintiff's easement and intervenor's privileges, and, in the absence of anything to show that intervenor's rights could in any way be affected by the decree, the petition to intervene was properly denied.

Forsyth v. American Maize Products Co., 634, 638 (4).

ELECTION—

Expense of, for township aid, see RAILROADS 45.

ELECTRICITY—

1. *Transmission of Electric Current.—Liability for Injuries.*—Where the furnisher of electricity supplies the same to a customer first through its own wires and then through wires owned and maintained by the customer, and over which the furnisher has no supervision or control, he is not liable for injuries resulting from the negligent manner in which the customer's wires are equipped and maintained.

Princeton Light, etc., Co. v. Ballard, 345, 347 (2).

2. *Transmission of Electric Current.—Liability for Injuries.—Evidence.—Instructions.*—In an action against an electric company for the death of an employe in a railroad shop to which electric current was supplied by defendant, where the evidence was conflicting as to whether the wires in said shop, alleged to have been negligently maintained, were owned and controlled by defendant, or were owned by and under the immediate care and supervision of decedent's employer, the court erred in refusing instructions advising the jury that defendant was not liable if it was found that such wires were owned and controlled by decedent's employer and that it was no part of defendant's duty to keep same in repair.

Princeton Light, etc., Co. v. Ballard, 345, 347 (3).

3. *Transmission Lines.—Right to Construct on Railroad Right of Way.—Statutes.—“Roads”.—“Highways”.—“Railroad”.—*Section

ELECTRICITY—Continued.

38 of the act of 1905, as amended in 1911 (Acts 1911 p. 421, §7686 Burns 1914), authorizing telephone companies and companies organized for generating and distributing electricity to construct their lines upon any of the public roads and highways of the State, does not authorize an electric company to construct its lines on the right of way of a railroad company without the permission of the owner of the fee, since, though the terms "roads" and "highways" are generic and are ordinarily understood to mean all kinds of public ways, including railroads, the terms are used in the statute in a restrictive sense and were intended to mean only such highways as are used by the public for ordinary travel, and which are under the control of the board of county commissioners, and a railroad is not a public highway in the sense that a country road for wagons and vehicles, or a street of like character in a town or city, is recognized.

Muncie Electric Light Co. v. Joliff, 349, 359 (12), 361 (12), 362 (12).

EMPLOYERS' LIABILITY ACTS—

See MASTER AND SERVANT 23.

EQUITABLE ASSIGNMENT—

See MORTGAGES 5.

ESTABLISHMENT—

Of highways, see HIGHWAYS 1, 2.

ESTATES—

Vesting of, see WILLS 6.

Claims against, see EXECUTORS AND ADMINISTRATORS 1-3.

ESTOPPEL—

See EXECUTORS AND ADMINISTRATORS 6; INJUNCTION 3; INSURANCE 14; MORTGAGES 11.

1. *By Deed.—Title of Remote Grantor.*—Neither party to an action involving a question of title can question the title of the common grantor to whom they trace their source of title.

Muncie Electric Light Co. v. Joliff, 349, 355 (6).

2. *Estoppel as a Defense.—Pleading.—Action Against Administrator.*—While estoppel is an affirmative defense, and, as a general rule, must be specially pleaded, in an action against an administrator evidence of estoppel is admissible under the general denial.

McConnell v. American Nat. Bank, 319, 325 (6).

EVIDENCE—

See APPEAL 106, 113, 116; BILLS AND NOTES 2-4; CARRIERS 14; COMPOSITIONS WITH CREDITORS 3; CONTRACTS 4, 7; DEATH 3; ELECTRICITY 2; INJUNCTION 3; INSURANCE 2, 3; MALICIOUS PROSECUTION 3; MASTER AND SERVANT 25; MUNICIPAL CORPORATIONS 14; RAILROADS 15, 16, 19-23, 29, 32; VENDOR AND PURCHASER.

Reception of, see TRIAL 3.

Review as to, see APPEAL 65-72.

Not in the record, see APPEAL 6.

While estoppel is an affirmative defense, and as a general rule, must be specially pleaded, in an action against an adminis-

EVIDENCE—Continued.

trator evidence of estoppel is admissible under the general denial, see **ESTOPPEL 2**.

1. *Judicial Notice.—Time of Sunset.*—The court takes judicial notice that on December 21, 1911, the sun set at 4:23 o'clock p. m. *Louisville, etc., Traction Co. v. Lottich*, 426, 431 (3).
2. *Opinion Evidence.—Admissibility.*—While it is not proper to take the opinion of witnesses on matters where the jury is able to form as reliable an opinion from the facts placed before it, the admission of such evidence will not work a reversal where it appears that the facts were not free from complication, and that appellant was not harmed by its admission.
W. McMillen & Son v. Hall, 545, 564 (22).
3. *Written Instruments.—Notice to Produce.—Statutory Provisions.*—The purpose of §502 Burns 1914, §479 R. S. 1881, relative to notice to produce writings before parol proof of their contents can be admitted, is to require the production of the best evidence if possible.
National, etc., Ins. Co. v. Wolfe, 418, 424 (8).
4. *Written Instruments.—Admissibility of Evidence of Contents.—Necessity for Notice to Produce Original.*—In an action on a policy of live stock insurance, there was no error in admitting in evidence the contents of a letter alleged to have been written to the company pursuant to the terms of the policy, notifying the company of the sickness of the animal insured, though no notice to produce the original had been given as required by §502 Burns 1914, §479 R. S. 1881, since, in view of testimony of the agent of defendant in charge of its correspondence that no such letter had been received by defendant, notice on defendant to produce it would have been futile.
National, etc., Ins. Co. v. Wolfe, 418, 424 (6).

EXCESSIVE DAMAGES—

See **APPEAL 70, 131, 134; DAMAGES 2**.

EXCESSIVE VERDICT—

See **DAMAGES 1; DEATH 2; TRIAL 2**.

EXECUTION—

Of promissory note, see **BILLS AND NOTES 3**.

EXECUTORS AND ADMINISTRATORS—

1. *Claims Against Estates.—Defenses.—Non Est Factum.*—In the trial of claims against decedent's estates, all defenses except set-off or counterclaims are available under §2842 Burns 1914, Acts 1883 p. 156, without being pleaded, so that in an action on a note against the estate of a decedent the defense of *non est factum*, though not pleaded, was available and placed upon claimant the burden of proving its execution.
Deeter v. Burk, 449, 454 (2).
2. *Claims Against Estates.—Action on Note.—Proof of Execution.*—The rule as to the proof necessary to create a *prima facie* case of the execution of a note to which the defense of *non est factum* is interposed, is the same whether the payor be living or dead at the time of the action, and regardless of whether the action is by way of claim against the estate of the payor or by complaint against him; §2842 Burns 1914, Acts 1883 p. 156, having

EXECUTORS AND ADMINISTRATORS—Continued.

no other effect in the trial of a claim against the estate, than to permit the defense of *non est factum* to be interposed without being pleaded. *Deeter v. Burk*, 449, 457 (5).

3. *Compromise of Claim with Guardian.—Confirmation of Contract.—Discretion of Court.*—Where a contract of settlement entered into between an administrator with the will annexed and the guardian of an insane legatee provided for the relinquishment of certain rights contended for by the guardian and showed that it was entered into to avoid litigation, etc., the confirmation thereof was a matter largely within the discretion of the court, and in view of evidence to sustain the petition, and the absence of anything to show an abuse of discretion, the judgment rendered in confirmation thereof can not be disturbed.

Fender v. Phillips, 85, 95 (9).

4. *Contract of Settlement with Guardian.—Petition for Confirmation.—Intervention by Guardian.*—Where an administrator with the will annexed entered into a contract with a guardian of a legatee for the compromise and settlement of claims of the guardian, pursuant to which the guardian procured an order of the court having jurisdiction of the guardianship in confirmation thereof, and thereafter while the petition of the administrator for confirmation was pending in the court having jurisdiction over the estate represented by him, the legatee died, whereupon such administrator attempted to enter a dismissal of his petition and refused to seek a confirmation, the guardian had a sufficient interest in the contract to intervene and ask that the contract be confirmed.

Fender v. Phillips, 85, 94 (7).

5. *Guardian and Ward.—Settlement of Claims.—Confirmation of Contract.—Legatees as Parties.*—Where the petition for the confirmation of a contract of settlement between an administrator with the will annexed and a guardian, whose ward was the husband of the testatrix and a legatee under the will, disclosed that the guardian was about to renounce the provisions of the will and claim under the law, and that to avoid this and to avoid litigation the contract of settlement was entered into, the contract was one within the authority of the administrator and guardian to make, and it was not essential that the legatees be made parties thereto or to the proceeding to confirm same.

Fender v. Phillips, 85, 92 (4), 94 (4).

6. *Privity of Administrator With Deceased Lessee.—Estoppel.*—The administrator of the estate of a deceased lessee stands in privity with his decedent and has no greater rights under the lease than decedent could have had, and hence is estopped from treating the lease as abrogated by a breach of the lessor which was induced by decedent.

Miller v. Ready, 195, 201 (3).

7. *Settlement of Claims.—Authority.*—An administrator may settle claims against the estate by compromising them, and should be allowed any sum paid out in so doing, if he has acted in good faith and with the care and judgment of a man of ordinary prudence and sagacity, and, as a general rule may adjust and settle claims due the estate without the consent of the next of kin; but in all cases, if the administrator has acted without obtaining the authority and direction of the court, he has the burden of proving good faith and diligence and that the act was beneficial to the estate.

Fender v. Phillips, 85, 92 (5).

8. *Settlement of Claims.—Contract Between Administrator and Guardian.—Consideration.*—Where the petition to the court, ask-

EXECUTORS AND ADMINISTRATORS—Continued.

ing the confirmation of a contract of settlement entered into between an administrator with the will annexed and the guardian of decedent's husband, disclosed that the guardian was insisting that under a certain item of the will the decedent's estate was required to pay all accrued expenses for the maintenance of his ward, that there was some question as to the right of election on behalf of the ward to take under the law instead of under the will, and that there was controversy as to the relative rights of the estates represented by the administrator and the guardian, respectively, all of which matters were compromised in such contract, a sufficient consideration for entering into the contract was shown.

Fender v. Phillips, 85, 91 (3).

FILLING BLANKS—

See COURTS.

FINAL JUDGMENT—

See JUDGMENT 3, 4.

FINDINGS—

See TRIAL.

FORECLOSURE—

See MECHANICS' LIENS 1-4.

FRAUD—

Against creditors, see CHATTEL MORTGAGES 1.

"GRANT"—

See WORDS AND PHRASES.

GUARDIAN AND WARD—

See EXECUTORS AND ADMINISTRATORS 3-5.

1. *Bond.—Power to Require Additional Security.*—The court may order a guardian to execute a new bond at any time it believes the assets of the estate are insecure.
Clymer v. State, ex rel., 364, 369 (1).
2. *Liability on Bonds.—Discharge of Sureties.*—Where a surety on a guardian's bond was released by the court, such release did not operate to relieve from liability the surety on an additional bond executed by the guardian to protect the proceeds arising from a sale of real estate.
Clymer v. State, ex rel., 364, 370 (3).
3. *Liability on Bond.—Release of Surety.—Statutes.*—Where a guardian, on procuring an order to sell his ward's real estate, was required to execute bond, and then upon the approval of the report of sale an order was made by the court on its own motion releasing and discharging the sureties on such bond, and such guardian thereupon filed a new bond, such order of release was ineffective to relieve the sureties from subsequent liability on the bond, since the beneficiary in such a bond has a vested interest therein and it will remain in full force unless the release is procured upon application and notice as provided by statute.
Clymer v. State, ex rel., 364, 369 (2).

GUARDS—

For machinery, see MASTER AND SERVANT 18.

GUEST—

Injury to, in automobile, see NEGLIGENCE 21, 22.

HARMLESS ERROR—

See APPEAL 119-129.

HIGH SCHOOL BUILDING—

Complaint to enjoin trustee from erecting, see SCHOOLS AND SCHOOL DISTRICTS 1, 2.

"HIGHWAYS"—

See WORDS AND PHRASES.

Repair of, see BRIDGES 2.

1. *Establishment.—Dedication.*—Lands may be irrevocably dedicated to the public for highway purposes by the open conduct of the owner, if his visible acts are such as to indicate an intention to dedicate the lands for such purposes and the public has in good faith acted thereon and accepted the dedication.
Pittsburgh, etc., R. Co. v. Errington, 371, 379 (6).
2. *Establishment.—Descriptions.—Sufficiency.*—The description of a highway as being "twenty feet in width off of the east side of lot No. 6 in tract No. 2 in Richardville's Reserve at the forks of the Wabash and Little River, and ten feet in width off of the west side of lot No. 5 in tract No. 2 in Richardville's Reserve at the forks of the Wabash and Little River, said strips of land to be north of the Maple Grove Gravel Road, and twenty feet wide off of the northwest side of lot No. 6 in tract No. 2 in the Richardville's Reserve of ten sections, at the forks of the Wabash and Little River", was sufficient, since technical accuracy is not necessary in such descriptions, and it is enough to enable a surveyor with the assistance of the points definitely named, to trace and designate the road.
Souers v. Stahl, 543.
3. *Duty of Supervisor.—Mandamus.*—The duty of a supervisor to keep highways in good repair is a public duty, imperative and, not discretionary, and he may be compelled by mandate to perform such duty.
Lamphier v. Karch, 661, 663 (3).
4. *Officers.—Duties.*—Under the provisions of §7763 Burns 1908, Acts 1907 p. 371, relating to the duties of a road supervisor the township trustee is the superior officer and the supervisor must carry out his orders with reference to highways when specifically given.
Lamphier v. Karch, 661, 663 (2).

HUSBAND AND WIFE—

Conveyances.—Inchoate Interest of Wife.—A wife, by joining her husband in a valid and effective deed extinguishes her inchoate interest in the land conveyed.
Little v. Mundell, 227, 236 (6).

IMPAIRING OBLIGATION OF CONTRACT—

See MASTER AND SERVANT 20.

"IMMEDIATE CAUSE"—

See WORDS AND PHRASES.

INCORPORATION—

See MUNICIPAL CORPORATIONS 3.

INDEBTEDNESS—

Averments as to, see SCHOOLS AND SCHOOL DISTRICTS 1.

IDENTIFICATION—

Sufficiency of, see RAILROADS 23.

INJUNCTION—

See MANDATORY INJUNCTION; SCHOOLS AND SCHOOL DISTRICTS 3.

1. *Burden of Proof.—Findings.—Review.*—In a suit to enjoin a landowner from interfering with the construction of plaintiff's line of electric transmission wires on a railroad right of way over defendant's land, plaintiff was required to come into court with clean hands in order to obtain the relief sought, and had the burden of proving its authority to erect its line of wires on such right of way by showing that such authority came from one having the right to give or confer it, and, in the absence of affirmative proof of such authority, the court was warranted either in finding against plaintiff as to such fact or in permitting the finding to be silent with reference thereto; hence, in such an action a finding against plaintiff on such question of authority can not be disturbed even if there is no affirmative evidence to support it.

Muncie Electric Light Co. v. Joliff, 349, 356 (7), 363 (7).

2. *Burden of Proof.—Issues.*—In a suit to enjoin a landowner from interfering with the construction of plaintiff's line of electric transmission wires on a railroad right of way over defendant's line, the burden of proving plaintiff's right to construct its line over the land in question was continuously on plaintiff, so that a finding that plaintiff obtained permission from the railroad company did not shift to defendant the burden of proving that the railroad company had no authority to grant such permission.

Muncie Electric Light Co. v. Joliff, 349, 357 (8).

3. *Evidence.—Estoppel.*—In a suit to enjoin defendant from interfering with the maintenance of plaintiff's line of electric wires over defendant's land, evidence that defendant made objection to plaintiff's employees who were actually engaged in the work of constructing the line along with those who were in immediate charge of the work was sufficient to prevent defendant from being estopped on the ground of standing by and seeing the work progress.

Muncie Electric Light Co. v. Joliff, 349, 358 (10).

4. *Right to Relief.—Legal Remedy.*—Where there is a complete and adequate remedy at law, relief will not be granted by injunction.

Jeffersonville School Tp. v. School City, etc., 83, 84 (2).

INSTRUCTIONS—

See TRIAL.

INSURANCE—

1. *Action.—Complaint.—Answer in Abatement.*—Where a policy of live stock insurance provided that the insurance was to be paid sixty days after proof of loss had been made by the insured and received by the company, and the complaint, in an action

INSURANCE—Continued.

on the policy, alleged facts showing a waiver of such provision by a denial of liability, an answer in abatement on the ground that the action was prematurely brought, because brought before the expiration of such sixty-day period, was insufficient in the absence of any statement either by direct allegation or inference that such sixty-day clause had not been waived.

National, etc., Ins. Co. v. Wolfe, 418, 421 (1), 422 (1).

2. *Action.—Evidence.*—In an action on an insurance policy letters passing between the insurer and its agent relative to the issuance and subsequent cancellation of the policy were inadmissible in evidence, the same being hearsay and not binding on insured.

New Amsterdam Casualty Co. v. New Palestine Bank, 69, 77 (6).

3. *Action on Policy.—Evidence.—Sufficiency.*—Where a policy provided that the premiums were payable in advance on or before each Monday, evidence showing that at times insured paid more than one premium in advance, that she died on July 3, 1911, and that a payment was made on May 22, 1911, though confusing and conflicting on the question of the amount paid on that date, was sufficient to sustain the verdict against the insurer under a provision of the policy that the insurance would be paid should the insured die while the premium was in arrears for a period not exceeding four weeks.

Public Savings Ins. Co. v. Coombes, 523, 527 (2), 528 (2).

4. *Action.—Parties.—Banking Partnership.—Action in Firm Name.*—Where partners engaged in the banking business sued in the bank name on an insurance policy purporting to name the individuals composing such partnership, but which in fact did not name them all, the insurance company could not avoid liability on the theory that the policy would support a recovery only in favor of the partners named therein, since under §3413 Burns 1914, Acts 1907 p. 174, §12, the bank had power to contract in the bank name and to sue and be sued, and the policy having been issued to it made it the real party in interest and the proper party to bring the action.

New Amsterdam Casualty Co. v. New Palestine Bank, 69, 76 (4).

5. *Construction of Policy.—Forfeiture Clauses.*—While insurance policies are rigidly construed against the insurer and liberally construed in favor of the insured in order to prevent a forfeiture, express provisions that a policy shall be void if the premiums are not paid in accordance with its terms are enforceable in the absence of statutory provisions to the contrary.

Public Savings Ins. Co. v. Coombes, 523, 526 (1).

6. *Denial of Liability.—Right to Maintain Action.*—Although a policy of insurance provides that no action thereon shall be brought until three months after making proof of loss, an action thereon may be brought immediately when liability is denied, although three months from the time of loss have not elapsed, since such denial of liability is a waiver of proof of loss.

New Amsterdam Casualty Co. v. New Palestine Bank, 69, 76 (5).

7. *Fraud in Settlement With Beneficiary.—Action for Damages.—Requisites.*—To sustain a judgment for plaintiff in an action against an insurer for damages on account of alleged fraud in making settlement under a policy in which plaintiff was the beneficiary, it must first appear that there was a valid contract of insurance on which defendant was liable, and, second, that the

INSURANCE—Continued.

settlement was induced and procured by fraud to the resulting damage of plaintiff as alleged.

Sovereign Camp, etc. v. Latham, 290, 294 (1).

8. *Fraud in Settlement With Beneficiary.—Measure of Damages.—Instructions.*—In an action to recover damages on account of fraud practiced on the beneficiary in making settlement under a certificate issued by defendant, the measure of damages is the difference between the amount received in the settlement and the actual value of the thing surrendered, so that an instruction placing the measure as the difference between the amount paid and the face value of the certificate, to which the jury could add interest, was erroneous.

Sovereign Camp, etc. v. Latham, 290, 306 (10).

9. *Life Insurance.—Rescission.—Return of Premiums.*—Where a contract of insurance provides that it shall be void if the death of insured results from the use of intoxicating liquors, or in consequence of the violation of law, no return of premiums paid to the insurer is necessary in order to avoid liability for a death occurring from either cause.

Modern Woodmen, etc. v. Young, 1, 6 (3).

10. *Life Insurance.—Rescission.—Return of Premiums.—Pleading.*—Where a warranty contained in an application for life insurance is in fact false, and the contract provides that a breach of warranty shall render it void and all premiums paid shall be deemed forfeited, the courts will treat the contract as voidable merely, and the insurer, in order to avoid liability thereunder, must act with reasonable promptness to that end on learning of the breach of the warranty, by rescinding the contract and making a return or tender of all premiums received by it thereunder, and in pleading such rescission a return or tender of the premiums must be alleged.

Modern Woodmen, etc. v. Young, 1, 4 (1).

11. *Life Insurance.—Rescission.—Return of Premiums.—Pleading.*—Where a policy of insurance provided that it would become null and void if the insurer acquired the habit of intemperate use of alcoholics, such specification was in the nature of a condition subsequent, or a promissory warranty, which would merely render the policy voidable if the insured became habitually intemperate, and, as in case of a breach of a warranty occurring simultaneously with the making of the warranty, will be treated as waived, in the absence of a rescission by the insurer within a reasonable time after learning the facts, accompanied by a return or tender of the premiums, except that a return or tender need only be made of the premiums received after the breach; hence an answer based on such breach must allege a rescission and return or tender of the premiums.

Modern Woodmen, etc. v. Young, 1, 5 (2).

12. *Live Stock Insurance.—Appraisal of Loss.—Instructions.*—In an action on a policy of live stock insurance, in which participation by the insured in the appraisal of loss was not made a condition precedent, failure by the insured to participate in such appraisal would not alone defeat his right to recover; hence instructions telling the jury that it was defendant's duty to request plaintiff to consent to an appraisal, and that the refusal of plaintiff to have anything to do with an appraisal was not of itself sufficient to relieve defendant from liability, correctly stated the law and were not conflicting.

National, etc., Ins. Co. v. Wolfe, 418, 424 (5).

INSURANCE—Continued.

13. *Live Stock Insurance.—Action on Policy.—Instructions.*—In an action to recover on a policy of live stock insurance, an instruction stating that in order for the defendant to secure an appraisalment of the animal insured the burden of proof was on defendant "to prove to your satisfaction" by a fair preponderance of the evidence that it requested plaintiff to consent to an appraisalment, that it selected an appraiser and notified plaintiff of that fact, and that it furnished blanks upon which to make the appraisalment, and further stating that if defendant had failed to prove such facts by a fair preponderance of the evidence the plaintiff was absolved from taking part in an appraisalment, was not objectionable as imposing on defendant by reason of the quoted words a higher duty than that of merely making proof by a preponderance of the evidence.

National, etc., Ins. Co. v. Wolfe, 418, 422 (3).

14. *Misrepresentations in Application.—Knowledge of Agent.—Estoppel.*—Where misrepresentations in an application for insurance were made by the agent of the insurer, with knowledge of the truth, the insurer is estopped from claiming that the policy is void because of false warranties.

New Amsterdam Casualty Co. v. New Palestine Bank, 69, 75 (2).

15. *Misrepresentations in Application.—Knowledge of Agent.—Cancellation.*—While an insurer may cancel a policy upon learning that there were misrepresentations in the application, even though such misrepresentations were made by insurers' agent with knowledge of the facts and without fault of the insured, such policy is nevertheless capable of enforcement until it is duly cancelled and the insured notified of such fact.

New Amsterdam Casualty Co. v. New Palestine Bank, 69, 75 (3).

16. *Mutual Benefit Insurance.—Contracts.—By-Laws.*—The by-laws of a mutual benefit society are regarded as a part of the contract between it and one to whom a certificate is issued.

Almy v. Commercial, etc., Assn., 249, 258 (4).

17. *Mutual Benefit Insurance.—Contracts.—Constitution and By-Laws.*—Where the constitution and by-laws of a fraternal organization are by the terms of the application made a part of the certificate, they, with the certificate, constitute the contract of insurance.

Sovereign Camp, etc. v. Latham, 290, 295 (2).

18. *Mutual Benefit Insurance.—Authority of Local Officers.—Knowledge.—Presumptions.*—An officer of the local camp or lodge of a fraternal insurance society, who is charged with the duty of collecting assessments and remitting them to the supreme organization, is the agent of the latter, and knowledge required by him in the performance of such duty is the knowledge of his principal, since it is conclusively presumed that knowledge so acquired is communicated by him to the principal.

Sovereign Camp, etc., v. Latham, 290, 301, (6).

19. *Mutual Benefit Insurance.—By-Laws.—Waiver.*—A provision in the by-laws of a fraternal insurance society that no officer or agent has the power or authority to waive any of the provisions thereof or any of the conditions upon which certificates are issued, may be waived the same as any other provision of the by-laws or condition of the certificate.

Sovereign Camp, etc. v. Latham, 290, 302 (7).

20. *Mutual Benefit Insurance.—Rights of Beneficiary.*—A beneficiary in a mutual benefit certificate ordinarily has no indefeasible

INSURANCE—Continued.

or vested interest in the certificate, owing to the fact that the power of changing the beneficiary is usually reserved to the person insured either by a by-law of the association or by statute.

Almy v. Commercial, etc., Assn., 249, 257 (3).

21. *Mutual Benefit Insurance.—Change of Beneficiaries.—Rights of Former Beneficiary.—By-Laws.*—A cross-complaint by a former beneficiary of decedent under a mutual benefit certificate, disclosing the fact that the beneficiary had been changed and a new certificate issued which was in force at decedent's death, and alleging that the change of beneficiaries was not made in accordance with a by-law requiring proof of notice to the beneficiary named in a certificate before a change of beneficiary could be made, was insufficient to show any right of action in cross-complainant. *Almy v. Commercial, etc., Assn.*, 249, 257 (2), 259 (2).

22. *Mutual Benefit Insurance.—Change of Beneficiaries.—By-Laws.—Waiver.*—The provision in a by-law of a mutual benefit society providing that proof of notice to the beneficiary named in a certificate is necessary before a change of the beneficiary may be had, is for the protection of the society and one which it may waive, so that on a change of beneficiary being consummated during the lifetime of the member without compliance with such by-law, the original beneficiary, if without any previously acquired equity in the certificate, can not attack the change.

Almy v. Commercial, etc., Assn., 249, 259 (5).

23. *Mutual Benefit Insurance.—Warranties in Application.—Effect of False Statements.*—Where the application for insurance provides that the representations and answers therein are warranted to be true, and the certificate issued thereon provides that if such representations or answers are in any respect untrue the certificate shall be null and void, it is essential, in order that the contract of insurance may not thereby be rendered voidable, that such representations and answers be true in every respect, regardless of the apparent materiality or immateriality thereof.

Sovereign Camp, etc. v. Latham, 290, 295 (3).

24. *Mutual Benefit Insurance.—Warranties in Application.—Breach.*—Where the applicant for insurance in a fraternal society stated in his application that he had never been afflicted with dropsy, scrofula, rheumatism, chronic catarrh, syphilis or insanity, and by its terms expressly warranted that he was of sound bodily health and mind, and stated on the certificate over his signature that he had read the certificate and warranted himself to be in good health at the time, answers by the jury to interrogatories showing that insured had had syphilis prior to the application, that at the time he was of unsound mind, etc., being supported by the evidence, showed such a breach of the warranty contained in the application as to render the contract void, in the absence of anything showing a waiver of the breach or an estoppel from asserting it.

Sovereign Camp, etc. v. Latham, 290, 295 (4).

25. *Mutual Benefit Insurance.—Warranties in Application.—Breach.—Waiver.—Knowledge of Local Officer.*—Where the clerk of the local camp of a fraternal insurance society, authorized to solicit and receive applications, was charged by the society's by-laws with the duty of collecting all moneys due the camp and locally due the sovereign camp, etc., evidence showing that on the day of the date appearing on the certificate issued to plaintiff's husband such clerk heard a conversation by decedent in

INSURANCE—Continued.

which decedent disclosed exaggerated notions concerning his business, that within a few days thereafter such clerk was informed by decedent's brother that decedent had been committed to the insane hospital because of paresis which resulted from syphilis which decedent had contracted early in life, and that such clerk then advised the brother that the certificate was valid, and thereafter advised plaintiff that the certificate was valid and would be paid at decedent's death if the dues were kept paid, etc., together with evidence that the dues were paid, and other evidence sufficient to charge defendant with the duty of inquiry as to decedent's condition at the time of his application, was sufficient to show a waiver of a breach of the warranty in the application as to decedent's health, and to estop defendant from asserting the invalidity of the certificate, notwithstanding a provision of its by-laws that no agent or officer had power or authority to waive same.

Sovereign Camp, etc. v. Latham, 290, 297 (5), 301 (5).

26. *Mutual Benefit Insurance.—Validity of Certificate.—Informalities Attending Issue.*—Informalities attending the issuance of the certificate sued on, consisting of an omitted signature to a printed statement that the applicant had made required payments and had been introduced as a member, and a failure to introduce or initiate the applicant, even if material to the validity of the certificate, must be deemed waived in view of evidence showing that the certificate was delivered, that all preliminary payments were made, that the dues and assessments were thereafter collected with full knowledge of the facts, that the insured was at all times treated as a member, and that after his death the certificate was taken up by the society for the purpose of making settlement, etc.

Sovereign Camp, etc. v. Latham, 290, 303 (8).

27. *Payment of Premiums.—Time for Payment.*—Under a policy of insurance providing that the premiums were payable on or before each Monday, payment of the weekly premium at any time during Monday was sufficient.

Public Savings Ins. Co. v. Coombes, 523, 528 (3).

28. *Policy.—Provisions Fixing Time for Payment.—Waiver.*—A clause in an insurance policy providing that the amount of the policy is to be paid sixty days after proof of loss has been made by the insured and received by the company may be waived so as to authorize an immediate action on the policy, by the company undertaking an investigation of its liability and then rejecting the claim and denying liability.

National, etc., Ins. Co. v. Wolfe, 418, 421 (2).

29. *Validity of Policy.—Application.—Knowledge of Agent.—Return of Policy for Correction.—Cancellation.*—In an action on a policy of insurance against burglary, findings of the trial court, sustained by the evidence, showing that erroneous statements in the application were made by defendant's agents, for which plaintiff was in no way responsible; that the application was forwarded by such agents to defendant and the policy issued by it in conformity thereto; that such policy was delivered by such agents to plaintiff who accepted and retained it for a time and then returned it for the sole purpose of having mistakes therein occasioned by the application corrected; and that defendant's agents, at the time the application was placed, knew the truth as to the facts misrepresented therein and specifically stated that

INSURANCE—Continued.

they had all the information that was necessary; show that the policy was valid as written and that its return for correction was not an offer for cancellation, or a refusal to accept the contract.
New Amsterdam Casualty Co. v. New Palestine Bank, 69, 74 (1).

INTENT—

Fraudulent, see CHATTEL MORTGAGES 1.

Of testator, see WILLS 3.

INTEREST—

See APPEAL 136.

INTERSTATE COMMERCE—

See CARRIERS 15, 16.

INTERVENER—

Striking out petition of, see APPEAL 129.

INTERVENING AGENCY—

See MASTER AND SERVANT 28.

Independent, see NEGLIGENCE 13.

INTERVENTION—

See PARTIES 1, 2.

JOINT TORTFEASORS—

See MALICIOUS PROSECUTIONS 4-6.

JUDGES—

1. *Special Judges.—Unauthorized Appointment.—Legality of Proceedings.*—The proceedings had before a special judge, whose appointment by the regular judge was without statutory authority and over the objections and exceptions properly made and reserved, are illegal.

Metropolitan Life Ins. Co. v. Stenger, 606, 609 (3).

2. *Special Judges.—Objections to Appointment.*—Where objection to the appointment of a special judge was made at the time, and exception reserved, the party objecting was not required to object to him qualifying, or to his several acts during the trial, in order to take advantage of the irregularity on appeal.

Metropolitan Life Ins. Co. v. Stenger, 606, 609 (2).

3. *Special Judges.—Appointment.*—Under §§428-431 Burns 1914, Acts 1903 p. 343, relating to the appointment of special judges, and providing that if a special judge appointed by the regular judge fails to qualify and assume jurisdiction within twenty days, etc., the appointment shall be deemed vacated, and that if another is not appointed in five days, the clerk shall, on request of either party, certify the facts to the Governor, who shall make the appointment, and under §427 Burns 1914, Acts 1907 p. 108, providing for the selection of a special judge by the striking off of names submitted by the regular judge, where the judge appointed on change of venue from the regular judge appointed another on change from himself, and his appointee failed to qualify, the regular judge was without authority to make a further appointment.

Metropolitan Life Ins. Co. v. Stenger, 606, 607 (1).

JUDGMENT—

Finality of, see **APPEAL 11.**

Motion for, on answers to interrogatories, see **TRIAL 8.**

1. *Collateral Attack.—Jurisdiction.*—Where a judgment or decree has been entered of record by a court of general jurisdiction, it will not be void for want of jurisdiction unless the fact that the court had no jurisdiction affirmatively appears upon the face of the record. *Frankel v. Voss*, 175, 180 (2).
2. *Collateral Attack.—Jurisdiction,—Process.*—Before a court can act it must determine that it has jurisdiction to decide the matter presented, which determination is a judicial act as conclusive against collateral attack as any other judicial decision; and, where a court, having jurisdiction of the subject-matter, adjudges that notice was given, such decision will repel a collateral attack, unless the record affirmatively shows that no notice was given, and even though the record shows that the notice was defective and irregular. *Frankel v. Voss*, 175, 180 (3).
3. *Final Judgment.—Appeal.*—A final judgment from which an appeal will lie is one that disposes of all the issues, as to all the parties, to the full extent of the power of the court to dispose of the same. *Smith v. Graves*, 55, 58 (2).
4. *Final Judgment.*—A final judgment is one that at once disposes of all the issues, as to all the parties involved in the controversy presented by the pleadings, to the full extent of the power of the court to dispose of same, and puts an end to the particular case as to all of such parties and all of such issues. *Daegling v. Strauss*, 672, 676 (2).
5. *Quieting Tax Titles.—Conclusiveness.—Persons Not Parties.*—Under §10393 Burns 1914, Acts 1901 p. 336, providing that all persons who have or claim to have an interest in or lien upon property sold for taxes shall be made parties to an action by the holder to quiet title thereto, persons not made parties are not bound by any judgment that may be rendered in such proceeding. *Hutchinson v. Wood*, 537, 540 (1).
6. *Quieting Tax Titles.—Conclusiveness,—Parties.*—Plaintiff holding a tax title to land which had been quieted in her grantor, could not enjoin the collection, by the divorced wife of the original owner, of a judgment awarded such divorcee for the support of the children prior to the quieting of such title in plaintiff's grantor, where it appeared that such divorcee had been made a party to the quiet title proceeding in her individual capacity only, since by the divorce decree she was made a trustee for her children, and a judgment against her individually could not disturb the interests of the children. *Hutchinson v. Wood*, 537, 540 (2).

JUDICIAL NOTICE—

The court takes, of the time of sunset, see **EVIDENCE 1.**

See **MASTER AND SERVANT 19.**

JURISDICTION—

See **JUDGMENT 1, 2; MUNICIPAL CORPORATIONS 9.**

Appellate, see **APPEAL 1, 2.**

JURY—

See **QUESTIONS FOR JURY.**

Disqualification of juror, see **NEW TRIAL 4.**

Instruction urging, to agree, see **APPEAL 91.**

The trial court is vested with large discretion in its decisions as to the competency of jurors, see **APPEAL 7.**

1. *Competency of Juror.—Business Relation with Party.*—As a general rule a person sustaining a business relation with one of the parties calculated to influence his verdict is not competent to serve as a juror in a cause, but the mere fact that a juror was a member of an association to which one of the defendants belonged and which was engaged in operating a neighborhood threshing machine for the convenience of the members and not for profit, was not such a business relation as to require setting aside the verdict, the association being in no way involved in the litigation. *Maffenbeier v. Koenig*, 518, 520 (1), 521 (1), 522 (1).
2. *Qualifications of Jurors.*—A juror is not qualified to sit in the trial of a cause if his eyesight is so defective that he can not see the expression on the faces of the witnesses and observe their deportment and demeanor while testifying, or if his hearing is so defective that he can not fully understand the proceedings, or if he is otherwise physically unfit to discharge the duties he is called upon to perform. *Zimmerman v. Carr*, 245, 247 (3).
3. *Selecting and Impanelling Jury.—Presumptions.*—After verdict, it will be presumed that the jurors were selected in the light of the provision of law that affords a trial by qualified jurors, and the party alleging disqualification has the burden to establish same. *Zimmerman v. Carr*, 245, 247 (2).
4. *Selection of Jurors.—Voir Dire Examination.*—Great precaution should always be taken to prevent the acceptance of jurors who are not likely to be able to do justice between the parties, and to the end that fair trials may be secured, great latitude is granted in the examination of jurors touching their qualifications. *Maffenbeier v. Koenig*, 518, 520 (2).

JUSTICES OF THE PEACE—

Powers and Duties.—Unauthorized Acts.—Liability on Bond.—The powers of a justice of the peace are wholly statutory, and though instruments of writing pertaining to his official duty, when attested by his official seal and signature, are presumptive evidence of his official character, his execution of a certificate not authorized by statute, though attested by his official seal, is not an official act within the meaning of his official bond; hence, where a justice executed under his official seal a certificate that a promissory note was signed by a certain person in his presence, when in fact it was not so signed, there was no breach of his official bond, since there is no statutory requirement or authority for the acknowledgment of a promissory note. (*Tucker v. State* [1904], 163 Ind. 403, and *State, ex rel. v. Walford* [1894], 11 Ind. App. 392, distinguished.)

State, ex rel. v. Reichard, 338, 343 (4).

KNOWLEDGE—

Of agent, see **INSURANCE 14, 15, 29.**

Of conditions, see **RAILROADS 15.**

Of prior contract, see **VENDOR AND PURCHASER.**

Of defect in sidewalk, see **MUNICIPAL CORPORATIONS 18.**

LANDLORD AND TENANT—

1. *Action for Rent.—Right to Trial by Jury.—Impanelling Jury.*—Under Art. 1, §20, of the Constitution providing that the right to trial by jury in civil causes shall remain inviolate, the defendant in an action for rent due under a lease was entitled to have his cause tried by competent and impartial jurors, and to that end to have invoked the rules of law applicable to the selection and impanelling of juries, in the absence of anything amounting to a waiver of such right. *Zimmerman v. Carr*, 245, 247 (1).
2. *Death of Lessee.—Rights and Liabilities of Administrator.*—On the death of a lessee the term of the unexpired portion of his lease becomes a personal asset of the estate to be inventoried, appraised and sold as other personal property; and, until in some manner released or discharged, the administrator is bound to perform the covenants of the lease and is liable for the rents to the extent of the assets in his hands.
Miller v. Ready, 195, 202 (6).
3. *Covenant for Repairs.—Death of Lessee.—Liability of Administrator.*—Where a lease providing that all inside repairs were to be made by lessee, was repudiated by administrator of lessee's estate, and, in an action to recover the rents for the time the premises remained unoccupied, together with the expense incurred in again renting them, there was evidence to show that repairs to the interior made by lessor before procuring the new tenant were reasonably necessary, the court did not err in allowing the lessor his reasonable expenses thus incurred.
Miller v. Ready, 195, 205 (11).
4. *Leases.—Construction.—Restrictive Covenants.*—Restrictive covenants in a lease, such as covenants against assignments or subletting, are not favorably regarded and are to be construed so as to prevent the restriction from extending any further than is necessary.
Miller v. Ready, 195, 205 (10).
5. *Leases.—Construction.—Transfer by Operation of Law.*—Stipulations in a lease that the premises were to be occupied by the lessee for a specific purpose, and were not to be sublet or otherwise occupied, or the lease assigned, without the written consent of the lessor, can not be construed as to prevent a transfer of the lease by operation of law, so as to relieve the administrator of the deceased lessee's estate from liability for the rent.
Miller v. Ready, 195, 204 (9), 205 (9).
6. *Leases.—Construction.—Personal Contracts.*—A lease of real estate does not assume the character of a personal contract so as to terminate on the death of the lessee, by reason of a stipulation therein that the premises are to be occupied by the lessee for a definite purpose and are not to be sublet, or otherwise occupied, or the lease assigned, without the written consent of the lessor, since such covenants though restrictive, are for the benefit of the lessor and may be waived.
Miller v. Ready, 195, 203 (7).
7. *Leases.—Covenant Against Assignment.—Transfer to Administrator of Deceased Lessee.*—On the death of a lessee the lease passes into the hands of the administrator as a part of the assets of the estate by operation of law, in the absence of an express stipulation to the contrary, regardless of a covenant against assignment.
Miller v. Ready, 195, 204 (8).
8. *Leases.—Breach of Covenant for Possession.—Waiver of Breach.*—Where a lessor's failure to place the lessee in possession on

LANDLORD AND TENANT—Continued.

the date fixed for the commencement of the term was due to an arrangement between the lessee and the occupant then in possession, made with the knowledge and consent of the lessor, whereby such occupant might hold over if not convenient to surrender possession at the commencement of lessee's term, the administrator of the lessee's estate, on the death of lessee prior to the beginning of the term, could not treat the lease as abrogated for failure to be placed in possession at the time therein specified.

Miller v. Ready, 195, 200 (2).

9. *Leases.—Implied Covenant for Possession.—Breach.—Rights of Lessee.*—Where a lease expressly provided that the term was to commence on a certain day, such provision amounted to an implied covenant of the lessor to put the lessee in possession on such day, and that the premises would not at that time be in the possession of another; so that the fact that a former occupant had not completely vacated the premises by that date, in the absence of anything to show that the lessee had waived his right to possession at that time, would have warranted the lessee's administrator in treating the lease as abrogated, and in refusing to take possession or to be bound by any of the provisions of the lease.

Miller v. Ready, 195, 199 (1).

10. *Tenant Under Former Owner.—Right to Crops.*—If possible, the law allows the one who sows to reap; hence the courts go far in holding that the owner of land, who allows a tenant under a previous owner to plant and cultivate crops without objection or the assertion of any rights therein, is estopped to assert any claim thereto.

Smith v. Frantz, 260, 270 (6).

LAST CLEAR CHANCE—

See NEGLIGENCE 2.

LEASES—

See CONTRACTS 6; LANDLORD AND TENANT 4-9.

Oil and gas, see PROPERTY 2.

LEGISLATIVE INTENT—

See STATUTES 1.

LETTERS—

That, properly addressed and stamped were mailed make a *prima facie* case of delivery in due course of mail, which, if denied, presents a question of fact for determination by the court or jury trying the cause, see TRIAL 1.

LICENSEE—

See RAILROADS 37.

By invitation, see NEGLIGENCE 18, 19.

Injury to, see NEGLIGENCE 15.

LIENS—

Priority of, see MORTGAGES 6.

Subsequent sale to satisfy attachment, see ATTACHMENT 3.

The lien on property attached relates back to the time the writ of attachment was placed in the hands of the sheriff, see ATTACHMENT 4.

LIFE INSURANCE—

See INSURANCE 9-11.

LIMITATION OF ACTIONS—

See REAL ACTIONS.

LIMITATION OF LIABILITY—

See CARRIERS 2, 15, 16.

LIVE STOCK—

Carriage of, see CARRIERS 1, 2.

LIVE STOCK INSURANCE—

See INSURANCE 13.

MACHINERY—

Failure to guard, see MASTER AND SERVANT 16.

MALICIOUS PROSECUTION—

1. *Complaint.—Sufficiency.*—A complaint for malicious prosecution alleging facts to show that plaintiff had been prosecuted by defendants, that in so doing they acted maliciously and without probable cause, that the prosecution was terminated by plaintiff's acquittal and final discharge, and that he had been damaged by such prosecution, states a cause of action.

Smith v. Graves, 55, 65 (9).

2. *Complaint.—Sufficiency.*—If a complaint for malicious prosecution shows the institution of the prosecution by the filing of the affidavit or complaint maliciously and without probable cause, it need not allege that defendants maliciously and without probable cause procured a warrant to be issued for plaintiff's arrest and that they followed up and continued such prosecution.

Smith v. Graves, 55, 64 (8).

3. *Damages.—Evidence.—Fee Paid in Defending Prosecution.*—In an action for malicious prosecution evidence of the amount of attorney's fees plaintiff was required to pay in defending against the prosecution is competent as affecting the amount of damages, and its admissibility is not affected by the question of whether the amount was reasonable or otherwise, though evidence upon that question is also competent.

Smith v. Graves, 55, 66 (11).

4. *Joint Tortfeasors.—Liability.*—The liability of a number of persons in procuring a malicious prosecution is several, without any right of contribution that can be enforced as between them, though they may be sued jointly or separately, and a satisfaction of the claim for damages obtained from one or any number of such persons terminates all liability against the others.

Smith v. Graves, 55, 59 (4).

5. *Joint Tortfeasors.—Liability.—Judgment.—Appeal.*—Where a person injured by a malicious prosecution procured by three persons elects to bring his action against the parties jointly, he can obtain no other legal satisfaction for the alleged wrong than that afforded by the judgment he obtains in such action, even though such judgment is based on a verdict against only two of the defendants without a finding for or against the third, and, since in view of the nature of their liability none of the defend-

MALICIOUS PROSECUTION—Continued.

ants affected by the verdict can complain that it was not also against their codefendant, the rule in actions on contract, that a verdict against part of the defendants without a finding either for or against the others is a nullity, does not apply; hence the judgment rendered in such case, like judgments in other cases, is presumptively valid, and is a final judgment from which an appeal will lie.

Smith v. Graves, 55, 60 (5), 62 (5).

6. *Joint Tortfeasors.—Trial.—Evidence of Other Prosecutions by One Defendant.*—In an action against three defendants for malicious prosecution, evidence that one of the defendants had instituted other prosecutions against the plaintiff was admissible against such defendant as tending to show malice and want of probable cause on his part, and his codefendants were not harmed by the admission of such evidence in view of an instruction to the jury limiting its application to the one defendant.

Smith v. Graves, 55, 65 (10).

MANDAMUS—

The road supervisor may be compelled by, to perform his duty, see HIGHWAYS 3.

MANDATORY INJUNCTION—

Answer in, see RAILROADS 46-50.

MASTER AND SERVANT—

1. *Injuries to Servant.—Answers to Interrogatories.—Choice of Ways.*—A special finding that plaintiff's decedent chose the way that he did in going about the performance of his work at the time of his injury, when he could have selected a safer way, is not equivalent to a finding that he voluntarily encountered a known and appreciated danger, and is not in conflict with a general verdict for plaintiff.

W. McMillen & Son v. Hall, 545, 560 (15).

2. *Injuries to Servant.—Answers to Interrogatories.—Review.*—Where appellant's contention that the jury's answers to interrogatories disclose that decedent's injury arose as an incident to the employment has no application to the second paragraph of complaint, and there is nothing to disclose that the verdict rests upon the first paragraph, the court will not determine if the contention is well taken as to the first paragraph, since it could in no event relieve appellant from liability under the second paragraph.

W. McMillen & Son v. Hall, 545, 559 (11).

3. *Injuries to Servant.—Answers to Interrogatories.—“Immediate Cause”.—Proximate Cause.*—Answers by the jury to interrogatories, in an action for the death of a stone mill employe caused by stone falling from a truck, showing that the truck was overloaded; that the stones, which were four feet wide, were placed on the truck edgeways and were not fastened; that the rope was fastened to one end of a beam under the stone; that power was suddenly applied, and that decedent was injured by the stone being thrown upon him by the sudden jerk of the truck, do not overthrow the general verdict as showing that the injury was brought on by the acts of decedent's fellow servants, since they disclose no more than that such conditions were the immediate cause of the injury and an “immediate cause” of injury is not necessarily the proximate cause.

W. McMillen & Son v. Hall, 545, 561 (16).

MASTER AND SERVANT—Continued.

4. *Injuries to Servant.—Answers to Interrogatories.—Verdict.—Presumptions.*—Where the answers by the jury to interrogatories show that the injuries complained of occurred in the state of Illinois, the court must presume, as to the legal questions presented in determining whether the answers conflict with the verdict on a paragraph of complaint charging common-law negligence, that the common law prevails in that state.

W. McMillen & Son v. Hall, 545, 559 (10).

5. *Injuries to Servant.—Answers to Interrogatories.—Verdict.—Contributory Negligence.*—Where the complaint alleged that the duties of plaintiff's decedent were to measure stone, direct the work in the millyard as to what stone was to be sawed, and to keep account of the same, and that he was not in any manner charged with furnishing appliances, tools or machinery, or to keep the working premises in safe condition, answers by the jury to interrogatories which did not disclose that decedent had anything to do with loading stone onto a truck, which fell therefrom and injured him because of defects in the track and appliances by which the truck was moved, though showing that he could have discovered the conditions which brought about his injuries had he looked, did not as a matter of law preclude a recovery or necessarily create a conflict with the general verdict, and the court can not say therefrom as a matter of law that decedent was not excused from looking, or that he was guilty of contributory negligence in not so doing.

W. McMillen & Son v. Hall, 545, 560 (14).

6. *Injuries to Servant.—Answers to Interrogatories.—Verdict.*—Where the complaint for personal injuries to a servant by reason of his foot slipping into an aperture near where he was standing while in the discharge of a certain duty, alleged that "as a direct and proximate result of his foot so entering into said aperture, and the negligence of the defendant in so leaving the same open, plaintiff lost his balance and fell with great force upon said iron grating upon his side and shoulder", etc., answers by the jury to interrogatories finding that plaintiff's injury was caused by falling and that the fall was caused by the plaintiff's foot slipping, but with no reference to the aperture, are in irreconcilable conflict with a general verdict for plaintiff, since reference to such aperture can not be supplied by reference or intendment, nor can it be said to be supplied by the general verdict. (*King v. Inland Steel Co.* [1912], 177 Ind. 201; *Evansville Hoop, etc., Co. v. Bailey* [1909], 43 Ind. App. 153; *Bessler v. Laughlin*, [1907], 168 Ind. 38; *Davis v. Mercer Lumber Co.* [1905], 164 Ind. 413; and *Cook v. Ormsby* [1910], 45 Ind. App. 352, distinguished.)

Kokomo Brass Works v. Doran, 583, 592 (7).

7. *Injuries to Servant.—Assumption of Risk.—Violation of Statutory Duty.*—In actions for injuries to a servant because of the master's failure to discharge a statutory duty the doctrine of assumed risk does not apply.

W. McMillen & Son v. Hall, 545, 559 (12).

8. *Injuries to Servant.—Assumption of Risk.—Knowledge.—Appreciation of Danger.*—In order to charge an employe with the assumption of the risk from which his injury resulted, especially where the injured person is an infant or otherwise lacking in experience or judgment, it must not only be shown that he knew of the defects and dangers, but that he appreciated them.

Vandalia Coal Co. v. Bland, 308, 315 (3).

MASTER AND SERVANT—Continued.

9. *Injuries to Servant.—Assumption of Risk.—Application of Rule.*—It is when applied to the evidence necessary to sustain an averment of want of knowledge of the defect or danger that full force and effect is given to the rule of assumed risk, rather than on a consideration of that question from the face of the complaint.
Vandalia Coal Co. v. Bland, 308, 317 (4).
10. *Duty of Master.—Assumption of Risk.—Safety of Place and Appliances.—Liability for Injuries to Servant.*—Generally it is the duty of the master to furnish a reasonably safe place of work and to use ordinary care in furnishing suitable and proper appliances while the servant assumes the risk ordinarily incident to the employment; and the master is liable for injury arising from an infirmity or defect in the place of work or appliance, of which he had knowledge or could have known and which he failed to remedy, if his negligence in that respect was the proximate cause of the injury; but he is not liable for injury resulting from an assumed risk or from contributory negligence.
W. McMillen & Son v. Hall, 545, 552 (1).
11. *Injuries to Servant.—Assumption of Risk.—Knowledge of Danger.—Complaint.—General and Specific Allegations.*—Where the complaint, in an action against a mining company for the death of an employe nineteen years of age, alleged generally that defendant knew of the conditions, ways, appliances, etc., complained of, and that decedent did not know of the dangers, etc., and could not in the exercise of reasonable care have known of same, and alleged specifically that decedent had been employed for several months as a car coupler on a certain "runaround entry" in defendant's mine wherein defendant carelessly maintained one of its cars with a bolt projecting therefrom so as to catch on the clothing of any one rubbing against same, and so as to rub a great groove in the wall of the entry, by reason of which "bolt and construction as aforesaid, said car on said date was dangerous", etc., and that plaintiff's decedent was injured while in the performance of a specific duty by coming in contact with said car and bolt and being caught between the car and the wall of the entry, etc., all without decedent's fault, it can not be said as a matter of law that the facts specifically pleaded show that decedent knew and appreciated the danger so as to be charged with assumption of the risk.
Vandalia Coal Co. v. Bland, 308, 313 (2), 315 (2), 317 (2).
12. *Injuries to Servant.—Common-Law Action.—Complaint.*—A complaint in a servant's action against the master for personal injuries is not good as the statement of a common-law action if it fails to allege that plaintiff did not at and prior to the accident have full knowledge of the conditions complained of, and full appreciation of any danger there might be in working at the place where he sustained the injury complained of.
Kokomo Brass Works v. Doran, 583, 588 (1).
13. *Injuries to Servant.—Complaint.—Sufficiency.*—A complaint in a servant's action for personal injuries alleging generally that the injury was due to the fault, negligence and carelessness of the master, is not insufficient as showing that the injury was the result of mere accident, in the absence of specific allegations to overcome the general averment of the master's negligence.
Kokoma Brass Works v. Doran, 583, 591 (6).
14. *Injuries to Servant.—Statutes.—Complaint.—Sufficiency.*—The Employer's Liability Act of 1911 (Acts 1911 p. 145, §8020a et seq.

MASTER AND SERVANT—Continued.

Burns 1914), must be strictly construed, and a complaint drawn under its provisions, to be sufficient, must affirmatively show facts within its provisions.

Kokomo Brass Works v. Doran, 583, 589 (2).

15. *Injuries to Servant.—Statutory Liability.—Complaint.—Requisites.*—The allegations of a complaint charging a master with liability for failure to take the precautions required by statute for the protection of a servant, must be such as to bring it within the statute, since, where machinery is not of a dangerous character, or is not located so as to endanger the safety of employes or where guarding or fencing is impracticable, the same need not be guarded or fenced.

W. McMillen & Son v. Hall, 545, 556 (4).

16. *Injuries to Servant.—Failure to Guard Machinery.—Liability.—Complaint.*—While no liability is created by the master's failure to guard machinery or properly fence and protect dangerous places unless the failure to do so is the proximate cause of the injury, a complaint charging negligence in such respect need not disclose that the particular injury complained of could have been anticipated by defendant, but is sufficient if it discloses that it could reasonably have been anticipated that an injury was likely to occur by reason of the condition of the place or appliances.

W. McMillen & Son v. Hall, 545, 557 (7).

17. *Injuries to Servant.—Complaint.—Sufficiency.*—A complaint for the death of a stone mill employe, charging negligence in the use of certain defective appliances and in improperly applying the power of an electric traveler to a truck drawing stone which fell upon decedent, in maintaining a defective track on which the truck was operated, in overloading the truck, and in not properly securing and fastening the stone thereon while being moved, though disclosing that the operation of the traveler and truck, as well as the manner of loading and applying the power, were under the control of defendant's servants, sufficiently stated a cause of action, where sufficient facts were alleged to show that decedent was unfamiliar with the surroundings and methods, that he was free from contributory negligence, and that in the absence of inherent defects in the traveler and track, of which defendant had knowledge, there would have been no necessity for the operation of the truck and appliances in the manner in which same were operated at the time.

W. McMillen & Son v. Hall, 545, 553 (2), 555 (2).

18. *Injuries to Servant.—Statutory Provisions.—Guards.—Complaint.—Sufficiency.*—A complaint for the death of a stone mill employe while at work in a mill operated by defendant in the state of Illinois, charging negligence in failing to fence or guard a passageway between a stone wall and a track on which a truck was operated in moving stone, came within the provisions of a statute of that state requiring power-driven machinery and all dangerous places about mills or workshops near to which an employe is obliged to pass or be employed to be properly fenced or guarded when practicable, where it appeared therefrom that the passageway through which decedent was obliged to pass and in which he was injured was but two feet wide, with a stone wall on one side ten feet high, and that the other side, along which the heavily loaded truck frequently passed, could have been fenced without interfering with its usefulness.

W. McMillen & Son v. Hall, 545, 556 (6).

MASTER AND SERVANT—Continued.

19. *Injuries to Servant.—Action Under Statute.—Complaint.—Requisites.—Judicial Notice.*—It is not requisite to the sufficiency of a complaint drawn under the Employer's Liability Act that specific reference be made to the act itself by title and page, but it is sufficient if the allegations bring it within the terms of the act, since the court takes judicial cognizance of the statutes of the State. *Kokomo Brass Works v. Doran*, 583, 590 (4).
20. *Injuries to Servant.—Action Under Statute.—Complaint.—Impairment of Contract.*—A complaint for injuries to a servant drawn under the Employer's Liability Act of 1911 (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), is not insufficient on the ground that, the relation of master and servant having arisen *ex contractu* prior to the passage of the act, to impose liability on defendant thereunder would be to impair the obligations of a contract, since the right to bring an action in the future in case of a possible tort is no part of the contract of employment and is subject to legislative change at any time. *Kokomo Brass Works v. Doran*, 583, 590 (5).
21. *Injuries to Servant.—Action Under Statute.—Complaint.—Sufficiency.*—The complaint in an employee's action for injuries from falling, alleging facts to show that defendant was a corporation engaged in business in this State, employing more than fifty persons, that plaintiff's injury was sustained while in the employ of defendant, and that the injury was due to the carelessness, negligence, fault or omission of duty of defendant, was properly construed as drawn within the provisions of the Employer's Liability Act of 1911 (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), and was therefore sufficient without negating assumption of the risk. *Kokomo Brass Works v. Doran*, 583, 589 (3).
22. *Liability for Injuries to Servant.—Concurring Negligence of Fellow Servant.*—An employer must answer for his own breach of duty proximately resulting in injury to a servant, although the negligence of other servants contributed to the cause that produced the injurious result. *W. McMillen & Son v. Hall*, 545, 554 (3).
23. *Employers' Liability Acts.—Construction.*—The statute of Illinois providing that power-driven machinery and all dangerous places about mills or workshops near to which an employe is obliged to pass or be employed, where practicable, shall be properly inclosed, fenced or otherwise guarded is substantially the same as the statute of Indiana providing for the safety of laborers in and about shops and factories, and is broad enough to embrace a wide scope in its interpretation. *W. McMillen & Son v. Hall*, 545, 556 (5).
24. *Injuries to Servant.—Duty of Master.—Instructions.*—An instruction merely stating that where an appliance is unguarded it should be guarded if practicable to do so, and that it is the duty of the master to see that it is so guarded, was not misleading or objectionable as requiring the master to guard in a particular manner or by a particular method. *W. McMillen & Son v. Hall*, 545, 563 (20).
25. *Injuries to Servant.—Evidence.—Jury Question.*—Where the evidence in an action for the death of a driver of cars in a coal mine was such as to produce uncertainty as to whether the accident occurred at a point in an old entry not within the provisions of §8582 Burns 1914, Acts 1907 p. 334, relating to the construction of entries, or whether it occurred at a point in an

MASTER AND SERVANT—Continued.

extension of the entry made since the act became effective, the question was properly for the jury and the court erred in directing a verdict. *Elder v. Erie Canal Coal Co.*, 598, 605 (3).

26. *Injuries to Servant.—Accidental Injury.—Instructions.*—Where the defense in a servant's action for personal injuries was that of purely accidental injury, it was error for the court to refuse an instruction stating that before plaintiff could recover he must show that his injuries were traceable directly and proximately to the negligence of the defendant, and that if plaintiff purposely or carelessly did any act which caused him to fall, or that he accidentally lost his balance and fell, and if the falling was not produced by the existence of the alleged defect, then such defect was not the proximate cause of plaintiff's injury and he could not recover. *Kokomo Brass Works v. Doran*, 583, 597 (10).

27. *Injuries to Servant.—Instructions.—Applicability to Issues.*—An instruction informing the jury that it was the master's duty to inspect and examine the premises where his servants were required to work, etc., was not objectionable as being outside the issues, where the complaint alleged that decedent was subject to the orders of the superintendent, and that inherent defects in the appliances had existed for some six months prior to the injury. *W. McMillen & Son v. Hall*, 545, 562 (18).

28. *Injuries to Servant.—Liability.—Intervening Agency.*—A master is not relieved from liability by the fact that the injury was caused by the concurring acts of himself and the fellow servants of the injured employe; and the negligence of the fellow servants, to constitute an intervening agency that would relieve the master, must have been outside the control of the master and not put in motion by his own wrongful act, and must have been such as to break the line of causation and become itself the proximate cause of the injury.

W. McMillen & Son v. Hall, 545, 557 (8), 562 (8).

29. *Safe Place to Work.—Mines.—Statutes.*—Where a driver operating a car in a coal mine is involved in a collision, wreck or other accident, produced by other causes than the failure of the mine operator to comply with §8582 Burns 1914, Acts 1907 p. 334, relating to the construction of entries, and such failure becomes the proximate cause of his injury by reason of his inability to escape from the car or track, the statute applies as well as in the case where the operator's failure to comply with the statute produces the collision, wreck or other accident as the proximate cause thereof resulting in the injury to the driver.

Elder v. Erie Canal Coal Co., 598, 605 (2).

30. *Safe Place to Work.—Mines.—Statutes.—"Or".*—Under §8582 Burns 1914, Acts 1907 p. 334, making it unlawful to construct any entry or trackway, after the taking effect of the act, in any coal mine where drivers are required to drive with mine cars, without a space on both sides of at least two feet in width and free from props, loose slate, etc., only such entries as are excavated after the act became a law come within its provisions, since the use of the word "or" is consistent with the assumption that the word "trackway" is an explanatory expression of the idea expressed by the word "entry", which refers to an opening in the mine in which a track is to be laid, rather than to the track itself; hence the act does not apply to an entry constructed prior to the enactment in which there has been a subsequent reconstruction of the track. *Elder v. Erie Canal Coal Co.*, 598, 603 (1).

MEASURE OF DAMAGES—

See **APPEAL 72**; **DAMAGES 3**; **INSURANCE 8**.

MECHANICS' LIENS—

1. *Foreclosure.—Pleading.—Ownership of Property.*—A pleading seeking the foreclosure of a mechanic's lien must aver facts showing the ownership of the property against which the lien is sought to be enforced. *Rader v. A. J. Barrett Co.*, 27, 30 (1).
2. *Foreclosure.—Cross-Complaint.—Sufficiency.—Ownership of Property.*—A cross-complaint seeking the enforcement of a mechanic's lien which, though not directly averring that cross-defendant was the owner of the property, alleged facts sufficient to disclose that he was the holder of the legal title at the time the material was furnished and the labor performed, sufficiently showed ownership to withstand a demurrer.
Rader v. A. J. Barrett Co., 27, 30 (2).
3. *Foreclosure.—Notice of Lien.—Sufficiency of Description.*—Where it was conceded that plaintiff in a proceeding to foreclose a mechanic's lien was within the provisions of the statute, and there were no rights of third persons involved, the court did not err in decreeing a foreclosure, although the real estate described in the notice was not that on which plaintiff's labor was performed, where it was alleged and proven that the house on which plaintiff performed the labor was the only house erected or repaired by defendants and that the lot on which it was situate was across the street from the lot described in the notice, and which defendants also owned; since the statute must be liberally construed in such case, and the notice, by mentioning the work performed, contained sufficient reference by which the lot on which the house was located could be identified.
Deal v. Plass, 185, 188 (3).
4. *Foreclosure.—Evidence.—Sufficiency.*—Evidence showing that at the time the materials were furnished and the labor performed in the repair of a hotel building, the real estate was in charge of certain persons under a contract of purchase requiring them to make repairs within a certain time, for which the owner should not be liable, and providing that the sum expended should be forfeited if the contract of purchase was not consummated by the execution of a deed, that thereafter such contract was not performed and possession of the real estate was surrendered to the owner, and showing that the material was furnished to and the labor performed for the occupants under such contract on the recommendation of the owner, did not show a case within the rule that a purchaser in possession under a contract of purchase can not cloud the vendor's title by suffering mechanics' liens to be filed against the property, nor within the rule that the conduct of the owner amounted to no more than mere inactive consent to the furnishing of the material and the performing of the labor, and was sufficient to support a finding against the owner.
Rader v. A. J. Barrett Co., 27, 31 (4), 32 (4).
5. *Statutes.—Construction.*—Mechanic's lien statutes, though strictly construed in determining the persons entitled to acquire and enforce such liens, are remedial in character and are to be liberally construed in favor of those entitled to their benefits.
Deal v. Plass, 185, 188 (2).
6. *Statutes.—Construction.*—The provision for mechanics' liens is purely a statutory remedy, and while one seeking its application

MECHANICS' LIENS—Continued.

must bring himself within the provisions of the statute in order to be successful, the statute is to be liberally construed to the end that those coming within its provisions may have the protection that it was intended to give.

Rader v. A. J. Barrett Co., 27, 32 (5).

MEMORANDUM—

Necessity of, of defects to demurrer to complaint, see **APPEAL** 95.

Of defects must accompany a demurrer to an answer, see **PLEADING** 7.

The court on appeal may look beyond the grounds stated in the, of defects to uphold the action of the lower court in sustaining a demurrer, but it will not look beyond such grounds to overthrow the overruling of a demurrer, see **APPEAL** 99.

MERGER—

See **MORTGAGES** 1-3.

MINES—

See **MASTER AND SERVANT** 29, 30.

MINES AND MINERALS—

Oil and Gas Leases.—Construction.—Forfeiture.—Right to Rentals.

—Under an oil and gas lease providing that lessee should commence a well within ninety days, or pay lessor twenty-five cents per acre at the end of each three months thereafter, or forfeit the lease, that completion of the well should liquidate all rentals for the remainder of the term, and that lessee might at any time reassign to the lessor, paying all rentals to date of reassignment, the forfeiture clause was for the exclusive benefit of the lessor, so that on failure of the lessee to drill a well, or pay the rental, or reassign the lease, the lessor could either declare the lease forfeited or sue for the rentals due thereunder. (*Butcher v. Greene* [1912], 50 Ind. App. 692, distinguished.)

Lamar v. Farmer, 501.

MISREPRESENTATION—

In application, see **INSURANCE** 14, 15.

MOOT QUESTION—

See **APPEAL** 16.

MORTGAGES—

1. *Acquisition of Legal Title.—Merger.—Intention.*—Intention expressed, or gathered from the facts and circumstances, is an important and often controlling factor in determining whether a merger has taken place where both the equitable and legal title meet in the same person; and a clear intention to do so, will preserve the lien of a mortgage and prevent a merger, where such intention when carried into effect works no injustice and leads to equitable results.

Lagrange v. Greer-Wilkinson Lumber Co., 488, 493 (5).

2. *Acquisition of Legal Title.—Merger.—Equity Rule.*—While in law there is a technical merger of the estates when the estate in fee and the equitable or mortgage estate meet in one person, a

MORTGAGES—Continued.

merger will be averted and the lien preserved under the equity rule when necessary to satisfy the ends of justice, as where one purchases real estate on which there is an encumbrance which he is not obligated to pay, and which he discharges to protect his title. *Lagrange v. Greer-Wilkinson Lumber Co.*, 488, 492 (2).

3. *Acquisition of Legal Title.—Merger.—Preservation of Mortgage as Against Subsequent Lien.*—Where the surety on a note took an indemnifying mortgage covering the land of the principal, which was of no greater value than the amount of the debt, the security of one claiming under a mechanic's lien thereafter acquired against the property was not lessened by reason of the subsequent acquisition by such surety for his own protection of the legal title to the land under a deed which, while reciting that the principal was thereby released from personal liability, clearly showed an intention to preserve the mortgage lien, and, no merger of the mortgage lien in the legal title was thereby effected, since under the circumstances the surety was entitled to the preservation of the mortgage for his protection as against such mechanic's lien.

Lagrange v. Greer-Wilkinson Lumber Co., 488, 493 (6).

4. *Cancellation of Record.—Reinstatement.—Priority as to Creditors Subsequent to Cancellation.*—Where, following the cancellation of a mortgage induced by the belief that a note given by the mortgagor in lieu of the mortgage note was valid, it developed that such new note was a forgery, and the bank entitled to such mortgage security brought an action to procure the reinstatement of the record of such mortgage, the court properly held that such mortgage when reinstated should be inferior to the lien of a mortgage taken in good faith by another bank subsequent to such cancellation in the belief that the property was then unincumbered; and the holding, as against persons who became general creditors of the mortgagor subsequent to such cancellation, that the lien of such mortgage was entitled to priority, was also correct in view of the fact that such general creditors had no knowledge at or before the time the loans were made by them that such mortgage had been cancelled of record, and were not thereby induced to make the loans, and the acts of the plaintiff were not such as to constitute an estoppel *in pais*.

McConnell v. American Nat. Bank, 319, 324 (5).

5. *Equitable Assignment.—Sale of Mortgage Note.*—The sale of a note secured by mortgage operates as an equitable assignment of the mortgage and thereafter the seller of the note holds the mortgage as trustee for such purchaser.

McConnell v. American Nat. Bank, 319, 323 (1).

6. *Liens.—Priority.*—The lien of a valid mortgage is superior to a subsequently acquired mechanic's lien unless the one claiming under the mortgage has acquired the legal title so as to work a merger of the estates represented by the deed and mortgage.

Lagrange v. Greer-Wilkinson Lumber Co., 488, 492 (1).

7. *Merger of Legal and Equitable Title.—Discharge of Encumbrance by One Primarily Liable.*—The payment of the debt by a purchaser of real estate who is primarily liable to discharge the encumbrance extinguishes the debt or lien and precludes him from invoking the equitable rule against merger for the protection of his property against valid liens thereon of other persons.

Lagrange v. Greer-Wilkinson Lumber Co., 488, 492 (3).

MORTGAGES—Continued.

8. *Purchase of Legal Title by Surety.—Release of Principal.*—Where the surety on a note given to a bank obtained the legal title to land covered by a mortgage indemnifying him against loss by reason of his suretyship, the bank was not bound to release the principal from his obligation on the note, though by the deed the surety made himself principal and became primarily liable to the bank for the debt.

Lagrange v. Greer-Wilkinson Lumber Co., 488, 493 (4).

9. *Record.—Cancellation.—Rights of Original and Subsequent Mortgagees.*—Where a mortgagee is in any way responsible for the mortgage being released of record, or if such release is procured through the fraud, incaution, credulity or misplaced confidence of the mortgagee, he is estopped in equity from asserting the priority of his mortgage as against one who has innocently dealt with the property in the belief that the mortgage was satisfied.

McConnell v. American Nat. Bank, 319, 324 (4).

10. *Record.—Unauthorized Cancellation.—Rights of Original and Subsequent Mortgagees.*—As between a mortgagee, whose mortgage has been discharged of record without his fault and by an unauthorized third person, and one who has been induced by such cancellation to believe that the mortgage was cancelled in good faith, and has dealt with the property by purchasing the title or accepting a mortgage thereon as security for a loan, the equities are balanced and the rights under the prior mortgage remain, notwithstanding such apparent discharge.

McConnell v. American Nat. Bank, 319, 323 (3).

11. *Reinstatement of Record.—Estoppel.—Complaint.*—The facts disclosed by a complaint to procure the reinstatement of the record of a mortgage, the cancellation of which had been induced by the delivery to plaintiff of a forged note which plaintiff accepted in the belief that it was valid, and after due investigation as to the worth of the surety thereon, did not show facts to constitute an estoppel as against persons who became general creditors of the mortgagor subsequent to such cancellation, and hence was not insufficient on the ground that it disclosed an affirmative defense in favor of such creditors.

McConnell v. American Nat. Bank, 319, 326 (7).

MOTIONS—

See PLEADING.

MUNICIPAL CORPORATIONS—

1. *Defective Streets and Sidewalks.—Notice of Injury.—Variance.—Review.*—In determining whether there is such a variance as to the place of injury as to preclude the admission in evidence of the notice of injury served by plaintiff on defendant city pursuant to §8962 Burns 1914, Acts 1907 p. 249, requiring notice of injury from defective streets or sidewalks as a condition precedent to maintaining an action therefor, it is proper for the court to resort to the evidence, not for the purpose of supplementing the notice or supplying deficiencies therein, but rather to apply the notice to the situation as it appears on the ground.

City of East Chicago v. Gilbert, 613, 620 (6).

2. *Defective Streets and Sidewalks.—Duty to Repair.—Rights and Duties of Traveler.*—The responsibility of keeping in mind a known defect or obstruction in a street or sidewalk does not

MUNICIPAL CORPORATIONS—Continued.

rest upon the traveler with the same degree of intensity as upon the municipality, and, while it is the duty of the latter to make reasonable inspection, and to repair defects and remove obstructions, so as to render the way reasonably safe for travel, the former, though bound to use ordinary care, need not make a close inspection, and may presume, in the absence of knowledge or means of knowledge to the contrary, that the municipality has performed such duty. *City of East Chicago v. Gilbert*, 613, 628 (13).

3. *Incorporation.—Authority to Contract.—Presumptions.*—It will be presumed that a city of this State is incorporated under the general laws of the State for the incorporation of cities, so as to be authorized to provide for the construction of sewers under §8961 Burns 1914, Acts 1905 p. 219, §267.

Julius Keller Constr. Co. v. Herkless, 472, 482 (6).

4. *Liability for Negligence of Contractor.—Instructions.*—In an action against a city and a contractor for the construction of a sewer to recover damages to a street improvement being constructed by plaintiff, alleged to have been caused solely by negligence in the work of constructing the sewer, where it appeared that the sewer contract was let by the city and the work done pursuant to §8722 *et seq.* Burns 1914, Acts 1905 p. 219, §117, and that by the terms of the contract the defendant contractor was to furnish all labor and material and assume liability for injuries to person or property, the city reserving to itself merely the right of general supervision with respect to whether the work and material complied with specifications, etc., instructions that a city is liable if it undertakes to construct a sewer and causes the work to be done in a negligent manner, and that cities are within the general rule that an employer must answer civilly for the negligence of an agent or servant, etc., were erroneously given, since the city's codefendant was an independent contractor, rather than the agent or servant of the city.

Julius Keller Constr. Co. v. Herkless, 472, 480 (5), 482 (5), 485 (5), 486 (5), 487 (5).

5. *Negligence of Independent Contractor.—Liability.—Defective Plans.*—A city is not liable in any case for consequential injury resulting from a public work, unless the plan is defective or the city directs the work to be done in an improper manner and the injury is the necessary consequence, in which event the one performing the work, though an independent contractor, will be regarded as the agent of the city in carrying out the defective plan or in doing the work pursuant to improper directions.

Julius Keller Constr. Co. v. Herkless, 472, 484 (8).

6. *Negligence of Independent Contractor.—Liability.*—A municipal corporation, like other contractees, is not answerable for the acts of an independent contractor, except where the work required to be done is inherently or intrinsically dangerous, or where the necessary consequence of doing the work as specified is injury to another, or where it is unlawful or involves a trespass, or where the subject-matter of the contract involves a duty, the performance of which may not be delegated by the contractee.

Julius Keller Constr. Co. v. Herkless, 472, 484 (7).

7. *Negligence of Independent Contractor.—Liability.—Nondelegable Duties.*—In situations involving certain duties resting primarily and absolutely on the city and the performance of

MUNICIPAL CORPORATIONS—Continued.

which it may not delegate to another to its own exemption, both the city and an independent contractor may be liable for injuries arising from the acts or omissions of the latter, unless the injury results entirely from some collateral act of the latter of which the city has no notice, either express or implied; the liability of the contractor being predicated on his own negligence, while that of the city is upon the fact that in committing to the contractor a nondelegable duty it makes him to that extent its agent for whose negligence it is liable.

Julius Keller Constr. Co. v. Herkless, 472, 485 (9).

8. *Opening Streets.—Appeal on Question of Damages.—Dismissal.*—An appeal on the question of benefits and damages arising from the opening of a street, taken pursuant to §§8704, 8705 Burns 1914, Acts 1905 p. 219, §§101, 102, is a special statutory proceeding, and the rule of the civil code relative to dismissals (§338 Burns 1914, §333 R. S. 1881) does not apply.

Isley v. City of Attica, 694, 698 (3).

9. *Opening Streets.—Appeal on Question of Damages.—Jurisdiction.*—Dismissal.—Where a person aggrieved by the action of a city in ordering the opening of a street through his premises, appealed to the circuit court on the question of damages, by filing an original complaint pursuant to §§8704, 8705 Burns 1914, Acts 1905 p. 219, §§101, 102, the court obtained no jurisdiction of the proceedings except on the question of benefits and damages, and therefore had no jurisdiction to dismiss the proceedings instituted before the common council.

Isley v. City of Attica, 694, 696 (1).

10. *Opening Streets.—Appeal on Question of Damages.—Dismissal.* There was no error in the dismissal by the circuit court of an appeal on the question of benefits and damages from the opening of a street, taken pursuant to §§8704, 8705 Burns 1914, Acts 1905 p. 219, §§101, 102, where the city's motion for dismissal disclosed that possession of the land had not been taken, and contained an offer to pay costs, since such action on the part of the city amounted to an abandonment of the proceedings.

Isley v. City of Attica, 694, 699 (4).

11. *Opening Streets.—Discontinuance of Proceedings.—Statutes.*—There is nothing in the provisions of §8700 *et seq.* Burns 1914, Acts 1905 p. 219, for the opening, changing or vacating of streets, to preclude the application of the general rule that a municipal corporation, that is proceeding to take private property for street or other public purposes, may discontinue the proceedings or abandon the appropriation at any time before the award of benefits and damages is finally ascertained and confirmed by the proper municipal authority, or before final adjudication where an appeal to the circuit court has been taken.

Isley v. City of Attica, 694, 697 (2).

12. *Ordinances.—Continuance in Force.—Presumptions.*—An ordinance duly proven is presumed to continue in force until the contrary is shown. *Pittsburgh, etc., R. Co. v. Macy*, 125, 142 (21).

13. *Ordinances.—Proof of Adoption and Contents.*—The authorized record of an ordinance and of the proceedings by which it was enacted afford the best evidence of its enactment and contents, notwithstanding statutory provisions permitting such proof by sworn or duly certified copies.

Pittsburgh, etc., R. Co. v. Macy, 125, 142 (19).

MUNICIPAL CORPORATIONS—Continued.

14. *Ordinances.—Validity.—Evidence.*—The duly identified record or ordinance book of a municipality containing the ordinance in question, is *prima facie* evidence of the validity of such ordinance and that all preliminary steps essential to its due enactment and enforcement have been regularly taken.
Pittsburgh, etc., R. Co. v. Macy, 125, 142 (20).
15. *Personal Injuries.—Contributory Negligence.—Burden of Proof.*—In an action for personal injuries from the defective condition of a sidewalk, defendant city has the burden of proof on the question of contributory negligence.
City of East Chicago v. Gilbert, 613, 626 (9).
16. *Personal Injuries.—Defective Sidewalks.—Contributory Negligence.*—While a sidewalk may be so defective as to preclude recovery by one on the principle of incurred risk if it appears that with the knowledge of its condition he ventured thereon and was injured, yet the mere fact that one goes upon a sidewalk with knowledge of a defect therein, and is injured thereby, does not necessarily prevent a recovery for such injury.
City of East Chicago v. Gilbert, 613, 626 (10).
17. *Personal Injuries.—Defective Sidewalks.—Contributory Negligence.—Jury Question.*—Where the evidence disclosed that plaintiff, who was injured by reason of a hole in a sidewalk, had some prior knowledge of the existence of such hole, and it further appeared that the hole was only about twenty-two inches long and four inches wide and was situated at one side of the walk which was six feet wide, the element of knowledge was merely for the consideration of the jury on the issue of incurred risk and contributory negligence; and the additional showing that plaintiff, having such previous knowledge forgot about the existence of such defect, did not conclusively show contributory negligence.
City of East Chicago v. Gilbert, 613, 626 (11), 628 (11).
18. *Personal Injuries.—Defective Sidewalks.—Contributory Negligence.—Knowledge of Defect.—Forgetfulness.*—Though a defect in a sidewalk may be so portentous of peril that a person attempting to use it would be chargeable with the responsibility of keeping it in mind or otherwise be found guilty of negligence contributing to an injury received in attempting to use the walk, a defect may be of such character that a momentary forgetfulness of its existence is excusable.
City of East Chicago v. Gilbert, 613, 626 (12).
19. *Personal Injuries.—Defective Sidewalks.—Complaint.—Sufficiency.*—A city owes to the public the duty to use reasonable care to keep its streets and sidewalks in a reasonably safe condition for the use of travelers; hence a complaint against a city for personal injuries caused by stepping into a hole in a sidewalk, alleging facts to show that defendant is a municipal corporation duly organized as a city, and that it negligently permitted the sidewalk to become and remain out of repair, is not open to the objection that it fails to show that the defect complained of resulted from the failure of the city to perform any duty incumbent upon it.
City of East Chicago v. Gilbert, 613, 617 (1).
20. *Personal Injuries.—Defective Sidewalks.—Knowledge.—Complaint.*—A complaint against a city for injuries received by reason of the defective condition of a sidewalk, alleging that for more than six months prior to the injury, the sidewalk had been defective in the particular alleged, and that defendant had full and complete knowledge and notice of said defective condition of

MUNICIPAL CORPORATIONS—Continued.

said sidewalk for six months prior to the injury, is not open to the objection that it charges knowledge only of the defective condition of the walk, and not knowledge of the hole therein which caused plaintiff's fall, in view of the fact that the general averment of the defective condition is followed by a particular description thereof including an allegation of the existence of the hole.

City of East Chicago v. Gilbert, 613, 618 (2).

21. *Personal Injuries.—Defective Sidewalks.—Complaint.—Averments.—Construction.*—A complaint for personal injuries caused by stepping into a hole in a sidewalk, charging that defendant city negligently permitted the sidewalk to remain in such defective condition, without any light, barrier, etc., that a person traveling along the sidewalk was unable to see the hole, and that plaintiff was unable to and did not see it on account of the darkness, and "that plaintiff's injuries were caused solely by the carelessness and negligence of defendant above alleged", is not to be construed as predelicting negligence upon the failure to light the street or to place lights in the vicinity of the defect, but as charging negligence with respect to the defective condition of the sidewalk, in connection with which the absence of light was an incident.

City of East Chicago v. Gilbert, 613, 619 (3).

22. *Personal Injuries.—Defective Sidewalks.—Notice of Injury.—Sufficiency.*—A notice served on defendant city pursuant to §8962 Burns 1914, Acts 1907 p. 249, by plaintiff who was injured by stepping into a hole in a sidewalk, setting forth that the injury occurred while plaintiff was walking on the east side of a certain street, "in front of lot 29, block 18, * * * a subdivision known as number 3353-3355 Commonwealth Avenue", was sufficient although the evidence showed that the hole was in front of lot 27, in view of the fact that the house numbers 3353-3355 were set apart for lot 27 and a house thereon bore the number 3353, and that there was no such hole in front of lot 29.

City of East Chicago v. Gilbert, 613, 619 (5), 620 (5), 621 (5).

23. *Personal Injuries.—Defective Streets and Sidewalks.—Notice of Injury.—Statutes.*—Section 9862 Burns 1914, Acts 1907 p. 249, is mandatory, and makes the giving of the notice therein provided for a condition precedent to a right of action for personal injuries caused by the defective condition of a street or sidewalk, and, while it is to be strictly construed in so far as it concerns the giving of the notice within the time specified and to the proper officers, a liberal construction is applied when determining whether a notice given was sufficiently definite as to the time, place, nature, etc., of the injury.

City of East Chicago v. Gilbert, 613, 621 (7).

24. *Personal Injuries.—Defects in Streets and Sidewalks.—Notice of Injury.—Statutes.*—Under §8962 Burns 1914, Acts 1907 p. 249, requiring the service of notice of injury caused by the defective condition of a street or sidewalk, the service of a proper notice upon certain designated officers of the city within the time specified is essential in order that an action for the injury may be sustained.

City of East Chicago v. Gilbert, 613, 619 (4).

25. *Public Improvements.—Injury to Third Persons.—Duty of City.*—The nature of the duty owing from a municipality to third persons, growing out of the construction of a public improvement, varies somewhat with the class to which the third

MUNICIPAL CORPORATIONS—Continued.

person belongs, as to whether he is an abutting owner, a traveler on a street, or an employe of the contractor.

Julius Keller Constr. Co. v. Herkless, 472, 486 (10).

26. *Public Improvements.—Streets.—Statutory Provisions.*—Sections 8710-8721 Burns 1914, Acts 1909 p. 412, Acts 1907 pp. 167, 550, relating to the improvement of streets, apply only where it is sought to make the improvements at the expense of the abutting property owners.

City of Jeffersonville v. Louisville, etc., Traction Co., 237, 241 (2).

27. *Public Improvements.—Streets.—Statutory Provisions.*—Where a city attempts to improve a street pursuant to §§8655, 8710-8721 Burns 1914, Acts 1905 p. 219, Acts 1909 p. 412, Acts 1907 pp. 167, 550, providing for making such improvements at the expense of the abutting property owners, there must be a strict compliance with such provisions.

City of Jeffersonville v. Louisville, etc., Traction Co., 237, 242 (4).

28. *Public Improvements.—Negligence of Contractor.—Liability to Abutters.*—A city owes no duty to an abutter to protect adjoining property against the negligence of a contractor in constructing a public improvement, where the plan is reasonable and not likely to work injury if properly carried out, though it may be liable if, through the negligence of the contractor, a situation perilous to adjoining property arises, and, after receiving or being chargeable with notice, it negligently fails to take steps to avert the threatened danger.

Julius Keller Constr. Co. v. Herkless, 472, 487 (11).

29. *Public Improvements.—Streets.—Statutory Provisions.*—While §§8655, 8710-8721 Burns 1914, Acts 1905 p. 219, Acts 1909 p. 412, Acts 1907 pp. 167, 550, provide a method for improving the streets of a city and for collecting the cost thereof, such provisions are not exclusive, and a city may improve its streets by virtue of §8961 Burns 1914, Acts 1905 p. 383, which gives to cities exclusive power over streets and alleys "to extend * * * and otherwise improve those already laid out, or that may be hereafter laid out".

City of Jeffersonville v. Louisville, etc., Traction Co., 237, 240 (1).

30. *Public Improvements.—Streets.—Liability of Street Railroad Company.—Complaint.*—A complaint against a street railroad company to collect the cost of improving that portion of a street occupied by its tracks, alleging that defendant was operating under a franchise ordinance providing that it should pay the cost of improvement of all that part of any street within its tracks, etc., and averring the adoption of a resolution for the making of such improvement and for assessing to the company the cost of that part of the improvement within its tracks, etc., though disclosing that the improvement was not pursuant to §§8655, 8710-8721 Burns 1914, Acts 1905 p. 219, Acts 1909 p. 412, Acts 1907 pp. 167, 550, disclosed a valid subsisting contract between the city and the defendant pursuant to which the improvement was made in that part of the street occupied by the tracks, and for the cost of which the city was entitled to recover.

City of Jeffersonville v. Louisville, etc., Traction Co., 237, 241 (3), 242 (3).

MUTUAL BENEFIT INSURANCE—

See INSURANCE 16-26.

NEGLIGENCE—

See CARRIERS 12-14; RAILROADS 7, 31, 32, 36; STREET RAILROADS 1.

Of contractor, see MUNICIPAL CORPORATIONS 4, 28.

Of independent contractor, see MUNICIPAL CORPORATIONS 5-7.

Specific acts of, see RAILROADS 5.

1. *Collisions on Streets.—Contributory Negligence.—Complaint.*—

A complaint for injuries to a motorcyclist who was struck by an automobile at a street crossing, alleging that plaintiff, when fifty feet away, saw the automobile approaching three hundred feet from the crossing, is not objectionable as showing that plaintiff was guilty of contributory negligence, in the absence of anything therein to show that he knew that the automobile was approaching at an excessive speed. *Picken v. Miller*, 115, 118 (2).

2. *Collisions on Streets.—Last Clear Chance.—Complaint.*—A com-

plaint for injuries to a motorcyclist who was struck by an automobile at a street crossing, alleging that though defendant "had ample time and room to drive his automobile to the west and rear of plaintiff, he carelessly and negligently drove the same to the east and right" and carelessly and negligently drove the same over and against plaintiff, and that defendant saw, or by the use of reasonable care could have seen plaintiff and avoided the collision, etc., was sufficient to invoke the application of the doctrine of last clear chance. *Picken v. Miller*, 115, 118 (3).

3. *Complaint.—Existence of Duty.—Inferences.*—In an action for negligence the complaint need not specifically allege that a duty was owing from defendant to the plaintiff, since the existence of a duty depends upon the facts alleged and the law will imply its existence where the facts pleaded warrant such inference.

Rock Oil Co. v. Brumbaugh, 640, 648 (4).

4. *Complaint.—Averment of Several Acts of Negligence.*—Several distinct acts of negligence may be charged in a single paragraph of complaint and a recovery on such complaint will be upheld if one of the acts of negligence charged has been sufficiently proved, unless the acts of negligence are so related as to show that the injury resulted from a combination of two or more of such acts.

Pittsburgh, etc., R. Co. v. Ervington, 371, 376 (2).

5. *Complaint.—Sufficiency.—Averment of Independent Acts.*—A complaint for damages resulting from the escape of oil from defendant's premises, was not objectionable because it charged negligence in failing to confine the oil on the premises and to erect walls and barriers that would confine it in the event a tank should burst, and also in the use of improper and insufficient hoops in the construction of the tanks, since a complaint alleging independent, negligent acts or omissions is not insufficient for want of facts if its averments show that any one of them was the proximate cause of the injury complained of.

Rock Oil Co. v. Brumbaugh, 640, 647 (3).

6. *Concurrent Negligence.—Liability.*—A person injured by the concurrent negligence of two parties may recover from either or both, and neither can avoid liability on the ground that the concurrent negligence of the other contributed to the injury.

City of Gary v. Geisel, 565, 569 (3).

7. *Contributory Negligence.—Knowledge of Danger.*—It is a matter of common knowledge that a physical body of considerable magnitude moving rapidly agitates the air and creates in its wake a suction which tends to draw other physical bodies towards

NEGLIGENCE—Continued.

- it; hence a woman of mature years was chargeable with knowledge of the fact that if she stood at the side of the track within 18 inches to two feet from the ends of the ties while a rapidly moving interurban car was passing, she was in a place of danger.
Eckhart v. Marion, etc., Traction Co., 217, 225 (6).
8. *Duty Toward Trespassers.*—The owner or occupant of premises, as a general rule, owes no duty to a trespasser thereon, except to refrain from wilfully or intentionally injuring him after discovery of his presence.
Cleveland, etc., R. Co. v. Means, 383, 391 (3).
9. *Fire from Escaping Oil.—Complaint.—Sufficiency.*—A complaint to recover damages on account of a fire caused by oil negligently escaping from the premises of the defendants, was not insufficient for failure to allege that it was practicable to confine the oil so that it would not escape, and even were a showing of practicability requisite, the overruling of a demurrer upon that ground was not error, where facts were alleged which reasonably warranted the inference that it was practicable to so confine the oil.
Rock Oil Co. v. Brumbaugh, 640, 649 (6).
10. *Fire from Escaping Oil.—Complaint.—Sufficiency.*—A complaint for damages on account of a fire caused by oil which defendants negligently permitted to escape from their premises, was not insufficient as not alleging that defendants owed plaintiff the duty of keeping the oil securely confined in receptacles on their premises, where enough facts were alleged to show that plaintiff was so situated as to be entitled to the protection afforded by §9062 Burns 1914, Acts 1913 p. 66, which requires oil and gas produced from wells to be safely and securely confined in wells, pipes or other safe and proper receptacles.
Rock Oil Co. v. Brumbaugh, 640, 648 (5).
11. *Fire from Escaping Oil.—Proximate Cause.—Complaint.*—A complaint charging negligence by defendants in keeping and maintaining their tanks and receptacles in such manner that on the bursting of a tank live crude oil flowed into a ditch maintained by defendants for draining dead oil and waste from their premises and thence through a second ditch into a public drain that plaintiff was dredging with a steam dredge; that defendants, knowing that the same was liable to ignite and damage plaintiff's property, negligently failed to warn him; that the live oil was similar in appearance and smell to the dead oil and waste hitherto flowing into the ditch; and that it accumulated around the dredge without plaintiff or his servants knowing that it was other than the dead oil or waste and was accidentally ignited by fire from the dredge, etc., causing the dredge to be destroyed, etc.; when construed in the light of the statute requiring oil and gas to be securely confined, and in the light of the law on analogous questions, shows that defendant's negligence was the proximate cause of plaintiff's loss.
Rock Oil Co. v. Brumbaugh, 640, 649 (7), 651 (7).
12. *Fire from Escaping Oil.—Verdict.—Answers to Interrogatories.*—In an action for the loss of plaintiff's dredge by fire through the ignition of oil which defendants negligently allowed to escape into a public ditch which plaintiff was dredging, a verdict for plaintiff was not overcome by the jury's answer to an interrogatory to the effect that there was no evidence to show that defendants knew that plaintiff's dredge was located in the ditch below the point where the oil escaped therein, when considered with other answers showing the distance of the dredge from defend-

NEGLIGENCE—

See CARRIERS 12-14; RAILROADS 7, 31, 32, 36; STREET RAILROADS 1.

Of contractor, see MUNICIPAL CORPORATIONS 4, 28.

Of independent contractor, see MUNICIPAL CORPORATIONS 5-7.

Specific acts of, see RAILROADS 5.

1. *Collisions on Streets.—Contributory Negligence.—Complaint.*—A complaint for injuries to a motorcyclist who was struck by an automobile at a street crossing, alleging that plaintiff, when fifty feet away, saw the automobile approaching three hundred feet from the crossing, is not objectionable as showing that plaintiff was guilty of contributory negligence, in the absence of anything therein to show that he knew that the automobile was approaching at an excessive speed. *Picken v. Miller*, 115, 118 (2).
2. *Collisions on Streets.—Last Clear Chance.—Complaint.*—A complaint for injuries to a motorcyclist who was struck by an automobile at a street crossing, alleging that though defendant "had ample time and room to drive his automobile to the west and rear of plaintiff, he carelessly and negligently drove the same to the east and right" and carelessly and negligently drove the same over and against plaintiff, and that defendant saw, or by the use of reasonable care could have seen plaintiff and avoided the collision, etc., was sufficient to invoke the application of the doctrine of last clear chance. *Picken v. Miller*, 115, 118 (3).
3. *Complaint.—Existence of Duty.—Inferences.*—In an action for negligence the complaint need not specifically allege that a duty was owing from defendant to the plaintiff, since the existence of a duty depends upon the facts alleged and the law will imply its existence where the facts pleaded warrant such inference. *Rock Oil Co. v. Brumbaugh*, 640, 648 (4).
4. *Complaint.—Averment of Several Acts of Negligence.*—Several distinct acts of negligence may be charged in a single paragraph of complaint and a recovery on such complaint will be upheld if one of the acts of negligence charged has been sufficiently proved, unless the acts of negligence are so related as to show that the injury resulted from a combination of two or more of such acts. *Pittsburgh, etc., R. Co. v. Ervington*, 371, 376 (2).
5. *Complaint.—Sufficiency.—Averment of Independent Acts.*—A complaint for damages resulting from the escape of oil from defendant's premises, was not objectionable because it charged negligence in failing to confine the oil on the premises and to erect walls and barriers that would confine it in the event a tank should burst, and also in the use of improper and insufficient hoops in the construction of the tanks, since a complaint alleging independent, negligent acts or omissions is not insufficient for want of facts if its averments show that any one of them was the proximate cause of the injury complained of. *Rock Oil Co. v. Brumbaugh*, 640, 647 (3).
6. *Concurrent Negligence.—Liability.*—A person injured by the concurrent negligence of two parties may recover from either or both, and neither can avoid liability on the ground that the concurrent negligence of the other contributed to the injury. *City of Gary v. Geisel*, 565, 569 (3).
7. *Contributory Negligence.—Knowledge of Danger.*—It is a matter of common knowledge that a physical body of considerable magnitude moving rapidly agitates the air and creates in its wake a suction which tends to draw other physical bodies towards

NEGLIGENCE—Continued.

it; hence a woman of mature years was chargeable with knowledge of the fact that if she stood at the side of the track within 18 inches to two feet from the ends of the ties while a rapidly moving interurban car was passing, she was in a place of danger.

Eckhart v. Marion, etc., Traction Co., 217, 225 (6).

8. *Duty Toward Trespassers.*—The owner or occupant of premises, as a general rule, owes no duty to a trespasser thereon, except to refrain from willfully or intentionally injuring him after discovery of his presence. *Cleveland, etc., R. Co. v. Means*, 383, 391 (3).

9. *Fire from Escaping Oil.—Complaint.—Sufficiency.*—A complaint to recover damages on account of a fire caused by oil negligently escaping from the premises of the defendants, was not insufficient for failure to allege that it was practicable to confine the oil so that it would not escape, and even were a showing of practicability requisite, the overruling of a demurrer upon that ground was not error, where facts were alleged which reasonably warranted the inference that it was practicable to so confine the oil.

Rock Oil Co. v. Brumbaugh, 640, 649 (6).

10. *Fire from Escaping Oil.—Complaint.—Sufficiency.*—A complaint for damages on account of a fire caused by oil which defendants negligently permitted to escape from their premises, was not insufficient as not alleging that defendants owed plaintiff the duty of keeping the oil securely confined in receptacles on their premises, where enough facts were alleged to show that plaintiff was so situated as to be entitled to the protection afforded by §9062 Burns 1914, Acts 1913 p. 66, which requires oil and gas produced from wells to be safely and securely confined in wells, pipes or other safe and proper receptacles.

Rock Oil Co. v. Brumbaugh, 640, 648 (5).

11. *Fire from Escaping Oil.—Proximate Cause.—Complaint.*—A complaint charging negligence by defendants in keeping and maintaining their tanks and receptacles in such manner that on the bursting of a tank live crude oil flowed into a ditch maintained by defendants for draining dead oil and waste from their premises and thence through a second ditch into a public drain that plaintiff was dredging with a steam dredge; that defendants, knowing that the same was liable to ignite and damage plaintiff's property, negligently failed to warn him; that the live oil was similar in appearance and smell to the dead oil and waste hitherto flowing into the ditch; and that it accumulated around the dredge without plaintiff or his servants knowing that it was other than the dead oil or waste and was accidentally ignited by fire from the dredge, etc., causing the dredge to be destroyed, etc.; when construed in the light of the statute requiring oil and gas to be securely confined, and in the light of the law on analogous questions, shows that defendant's negligence was the proximate cause of plaintiff's loss.

Rock Oil Co. v. Brumbaugh, 640, 649 (7), 651 (7).

12. *Fire from Escaping Oil.—Verdict.—Answers to Interrogatories.*—In an action for the loss of plaintiff's dredge by fire through the ignition of oil which defendants negligently allowed to escape into a public ditch which plaintiff was dredging, a verdict for plaintiff was not overcome by the jury's answer to an interrogatory to the effect that there was no evidence to show that defendants knew that plaintiff's dredge was located in the ditch below the point where the oil escaped therein, when considered with other answers showing the distance of the dredge from defend-

NEGLIGENCE—Continued.

ants' premises, the length of time it had been in operation, the ability of defendants' servants to see the dredge, and hear it when in operation, etc. *Rock Oil Co. v. Brumbaugh*, 640, 653 (11).

13. *Fire from Escaping Oil.—Independent Intervening Agency.*—Where defendants, having knowledge that plaintiff was engaged in dredging a public ditch with a dredge operated by steam generated by burning coal, negligently permitted live oil, similar in appearance and smell to noninflammable, dead oil and waste hitherto flowing therein, to escape into such ditch without warning to plaintiff, who had no knowledge that the oil accumulating about the dredge was other than the dead oil and waste matter, and in the necessary and proper operation of the dredge fire was accidentally brought in contact with the live oil, resulting in its ignition and the destruction of plaintiff's dredge, the firing of the oil was not an independent agency beyond appellants' control which could not reasonably have been anticipated, but was an occurrence that should reasonably have been expected in the usual course of events and according to common experience in handling such oil, and did not break the chain of causation between the negligence alleged and the injury complained of.

Rock Oil Co. v. Brumbaugh, 640, 652 (10).

14. *Fire from Escaping Oil.—Contributory Negligence.—Review.*—Where it was alleged that plaintiff's dredge was destroyed by fire through the ignition of live petroleum which defendants negligently permitted to escape into a ditch which the plaintiff was dredging, without informing plaintiff of its presence or that it was other than noninflammable, dead oil and waste matter hitherto flowing in such ditch, the verdict for plaintiff can not be disturbed on the theory that all persons are presumed to know the nature and character of such oil, and that plaintiff's employes had notice of the danger before the fire occurred, since the contention does not meet the theory of the complaint, which was supported by some evidence, as well as by the jury's answers to interrogatories, and in view of the fact that it was the duty of defendants under the circumstances shown to take every precaution to avert the danger incident to the presence of the live oil about the dredge, which duty it might have discharged by the giving of timely notice. *Rock Oil Co. v. Brumbaugh*, 640, 654 (12).

15. *Injury to Licensee.—Licensee by Permission.*—A licensee who enters on premises by permission only, without any enticement, allurements or inducement being held out to him by the owner or occupant, enters at his own risk and enjoys the license subject to its concomitant perils.

Cleveland, etc., R. Co. v. Means, 383, 392 (4).

16. *Injury to Licensee.—Licensee by Invitation.—Duty of Owner or Occupant of Premises.*—The owner or occupant of premises owes to a licensee thereon by invitation the duty of making and keeping such premises in a reasonably safe condition suitable for the use of such licensee while he remains thereon under such invitation, for a breach of which he is liable for resulting injury to such licensee, if the latter is free from contributory negligence.

Cleveland, etc., R. Co. v. Means, 383, 393 (5).

17. *Injury to Licensee.—Liability.—Licensee by Permission.*—The owner of premises is not liable to a licensee by permission for injuries from mere passive negligence or owing to defects in the condition of the premises, since such a licensee, being one who for his own convenience, curiosity or entertainment goes upon

NEGLIGENCE—Continued.

the premises by permission or sufferance of the owner, is held to take the premises as he finds them.

Cleveland, etc., R. Co. v. Means, 383, 393 (6).

18. *Licensee by Invitation*.—A licensee by invitation is one who goes upon the land of another with the express or implied invitation of the owner or occupant, either to transact business with the owner or occupant, or to do some act which is of advantage to such owner or occupant, or of mutual advantage to both the licensee and the owner or occupant.

Cleveland, etc., R. Co. v. Means, 383, 394 (8).

19. *Licensees.—Invitation.—Failure to Object*.—Mere acquiescence, or failure to object, is not in itself sufficient to sustain an inference that a licensee upon the premises of another was a licensee by invitation.

Cleveland, etc., R. Co. v. Means, 383, 394 (9).

20. *Liability for Injuries to Licensee or Trespasser*.—Notwithstanding general rules, there are exceptional cases, though not subject to classification under either the last clear chance or attractive nuisance doctrine, wherein liability arises against the owner or occupant of premises for injuries to a child going thereon, whether as a trespasser or as a licensee, by permission or invitation, from the fact of the presence of such child in a situation of peril and the knowledge of the owner or occupant, actual or constructive, of such child's presence in a perilous and helpless situation, and the resultant duty in view of such knowledge to use care.

Cleveland, etc., R. Co. v. Means, 383, 398 (10).

21. *Injury to Guest in Automobile.—Proximate Cause.—Verdict.—Answers to Interrogatories*.—A verdict against defendant city in favor of plaintiff, who, while riding as a guest in an automobile, was thrown therefrom by reason of sudden contact of the machine with a hole in the street, was not overcome by the jury's answer to an interrogatory showing that plaintiff's injury was caused by the negligence of the chauffeur, since it does not necessarily follow that the latter's negligence was the sole proximate cause of plaintiff's injury, or that it was more than concurrent negligence operating with that of defendant.

City of Gary v. Geisel, 565, 569 (4).

22. *Injury to Guest in Automobile.—Contributory Negligence.—Answers to Interrogatories*.—Answers to interrogatories showing that an automobile in which plaintiff was riding as a guest at the time he was injured was being driven at an unlawful rate of speed, without objection from plaintiff, do not overcome a general verdict against defendant on the theory that contributory negligence of plaintiff is shown by his failure to remonstrate with the chauffeur and request him either to drive slower or permit plaintiff to leave the machine, when considered in view of the conditions at the time and the facts that plaintiff was a guest in the rear seat, with no control over the chauffeur, and that the machine had been driven at such unlawful speed for only about forty-five seconds, when the accident occurred.

City of Gary v. Geisel, 565, 570 (5).

23. *Injury to Property.—Contributory Negligence.—Instructions*.—An action for injury to a street improvement in course of construction by plaintiff, caused by alleged negligence of defendants in the construction of a sewer along the line of such improvement, involved a property, rather than a personal injury, making it the duty of plaintiff to prove the allegation of his complaint that

NEGLIGENCE—Continued.

he was free from contributory negligence; hence an instruction that if defendant contractor was negligent as alleged, it and the defendant city were liable for all damages alleged and shown by a preponderance of the evidence to have proximately resulted from such negligence, was fatally erroneous in ignoring the issue of contributory negligence, in view of evidence tending to show contributory negligence and the failure of the court to cover the issue in any other instruction.

Julius Keller Constr. Co. v. Herkless, 472, 478 (4).

24. *Proximate Cause*.—To make a negligent act or omission the proximate cause of an injury, it is not essential that the particular or actual consequences must have been anticipated, nor need the act or omission have been the closest in point of time or position to the injury, but the proximate cause is that which causes, or fails to prevent, an injury that might reasonably have been anticipated to result and without which the injury would not have occurred, regardless of the number of intervening or concurring agencies.

Rock Oil Co. v. Brumbaugh, 640, 650 (8).

25. *Questions of Law or Fact*.—Whether a party sought to be charged with liability for negligence owed any duty to observe care toward the person injured is a question of law for the court, while the question of whether such duty was properly performed is a question of fact for the jury.

Cleveland, etc., R. Co. v. Means, 383, 402 (11).

26. *Trial—Verdict*.—A general verdict for plaintiff in an action for personal injuries is a finding that defendant was guilty of negligence which was the proximate cause of the injury, and that plaintiff was free from contributory negligence.

Louisville, etc., Traction Co. v. Lottich, 426, 430 (1).

27. *Trial—Instructions*.—In an action by the contractor for the construction of a cement curb and gutter, against the city and a contractor for the construction of a sewer to recover damages occasioned by alleged negligence in the sewer construction resulting in injuring and impeding the work under construction by plaintiff, an instruction that municipal corporations are within the general rule that the superior or employer must answer civilly for the negligence of an agent or servant in the course of his employment, etc., and that if it was found that a contract was entered into by the city with its codefendant for the construction of a sewer, pursuant to which the sewer was constructed as alleged, and that in such construction the contractor was negligent in any one or more particulars as alleged, both the city and the sewer contractor would be liable to plaintiffs for all damages sustained, if any, which were alleged and were shown by a preponderance of the evidence to have proximately resulted from the acts complained of, was not open to the objection that it made defendants liable for all damages resulting from the work of the construction company if it were found to have been guilty of negligence in but one alleged particular, and regardless of whether such negligence was a proximate cause of all such damage.

Julius Keller Constr. Co. v. Herkless, 472, 477 (3).

NEW TRIAL—

Motion for, see APPEAL 21-24.

1. *Argument in Support of Motion—Discretion of Court*.—The right to be heard in argument in support of a motion for new

NEW TRIAL—Continued.

trial does not exist under the practice, and the question of the necessity or advisability of such argument is for the trial court.
Sovereign Camp, etc. v. Latham, 290, 308 (12).

2. *As of Right.—When May be Had.*—When the complaint stated two substantive causes of action, in only one of which a new trial as of right was demandable, a new trial as of right could not be had; so that in an action by one claiming under defendant in a foreclosure proceeding for the possession of the land sold under the decree, where the complaint, in addition to alleging the facts upon which the right to possession was asserted, also sought an adjudication of the amount of purchase money paid by the purchaser at such foreclosure sale, with interest, and contained an offer to pay such sum to whomsoever the court might direct, etc., a new trial as of right was properly denied.
Frankel v. Voss, 175, 182 (5).
3. *Grounds.*—That the verdict of the jury is contrary to the evidence is not ground for a new trial.
Indiana Union Traction Co. v. Cauldwell, 513, 515 (1).
4. *Grounds.—Disqualification of Jurors.—Affidavit.—Sufficiency.*—An affidavit in support of a motion for new trial on the ground that a juror was disqualified because of deafness, which set forth facts merely showing that the juror did not hear all the testimony of the witnesses, but which did not affirmatively disclose that such failure was due to the deafness of the juror, was insufficient.
Zimmerman v. Carr, 245, 248 (4).
5. *Grounds.—Refusal of Change of Venue.—Error of Probate Commissioner.*—A motion for a new trial alleging that the probate commissioner, to whom the cause had been referred by the circuit court for trial and finding, erred in overruling defendant's motion for a change of venue, does not present the question of whether the trial court erred in the overruling of such motion.
McClain v. Steele, 657, 660 (3).
6. *Grounds.—Appeal.*—That the finding and judgment of the court are not sustained by sufficient evidence, and that the finding and judgment of the court are contrary to law, are not authorized by the statute as grounds for a new trial, and are insufficient to present any question on appeal.
Ferdinand R. Co. v. Bretz, 123, 124 (2).
7. *Motion.—Filing.—Statutes.*—Under §587 Burns 1914, Acts 1913 p. 848, relating to the time for filing a motion for new trial, the mere filing of the motion in the clerk's office is not sufficient, but the motion must be called to the court's attention, and, if the court has adjourned, the motion should be called to the court's attention within a reasonable time, depending upon the circumstances of each case.
Intermediate Life, etc., Co. v. Cunningham, 326, 329 (2).
8. *Motion.—Filing.—Review.*—Where, pending an adjourned term of court, at which a verdict was rendered for plaintiff, the defendant filed a motion for new trial with the clerk who made a vacation entry of such filing, and there was nothing to show that the motion was presented to the trial court within thirty days from the time the cause was tried and judgment rendered, the court did not err in sustaining a motion to strike same from the files and to expunge such vacation entry of its filing.
Intermediate Life, etc., Co. v. Cunningham, 326, 328 (1), 329 (1).

NON EST FACTUM—

Defense of, see EXECUTORS AND ADMINISTRATORS 1, 2.

A verified general denial performs the office of an answer of, see PLEADING 6.

NOTICE—

See APPEAL 28-30.

Constructive, see RAILROADS 35.

Ineffectual, see APPEAL 30.

Of lien, see MECHANICS' LIENS 3.

Necessity for, or demand, see SPECIFIC PERFORMANCE 1, 2.

To produce written instruments, see EVIDENCE 3, 4.

To city of injury, see MUNICIPAL CORPORATIONS 1, 2, 22-24.

Instrument not entitled to be recorded is no, to any one without actual knowledge, see RECORDS.

OFFICERS—

1. *Action on Official Bond.—Liability.*—In an action on the bond of an officer, brought against him and the surety thereon, his liability is identical with that of the surety, and he is not liable if the surety is not liable. *State, ex rel. v. Reichard*, 338, 342 (3).

2. *Official Bonds.—Liability of Sureties.*—Where an officer, assuming to act as such, commits a wrong under circumstances where the law does not impose upon him any duty to act at all, the wrong is not the violation of any official duty for which the surety on his official bond can be held liable.

State, ex rel. v. Reichard, 338, 342 (2).

OIL—

Fire from escaping, see NEGLIGENCE 9-14.

OPINION EVIDENCE—

See EVIDENCE 2.

"OR"—

See WORDS AND PHRASES.

ORDINANCES—

See MUNICIPAL CORPORATIONS 12-14.

OWNERSHIP—

Of fee, see RAILROADS 41.

Must be shown of the property against which the lien is sought to be enforced, see MECHANICS' LIENS 1, 2.

PAROL EVIDENCE—

Admissibility of, see COMPOSITIONS WITH CREDITORS 2; CONTRACTS 8

Where the consideration is contractual the consideration mentioned in a written contract can not be varied by, see CONTRACTS 2.

PARTIES—

See APPEAL 25, 26, 60; EASEMENTS 1, 2; INSURANCE 4.

Construction by, see CONTRACTS 3, 4.

Legatees as, see EXECUTORS AND ADMINISTRATORS 5.

Persons not made, are not bound by any judgment that may be rendered in an action quieting tax title, see JUDGMENT 5, 6.

In order to confer jurisdiction in a vacation appeal all coparties to the judgment must be joined as appellants and be duly notified, see APPEAL 1.

1. *Intervention.*—Where one, not a necessary party under the statute, seeks to intervene, the trial court may exercise its discretion and unless there is a clear abuse of such discretion no error is committed in denying the right to intervene.

Forsyth v. American Maize Products Co., 634, 637 (1).

2. *Intervention.—Diligence.*—An intervener must be diligent, and any unreasonable delay after knowledge of the suit will justify the court in refusing to allow the intervention, if he is not a necessary party to a full and complete adjudication of the rights involved, and has shown no satisfactory excuse for the delay.

Forsyth v. American Maize Products Co., 634, 637 (2).

PARTNERSHIP—

Banking, see INSURANCE 4.

PASSENGERS—

Duty to, see CARRIERS 3.

Ejecting, see CARRIERS 4.

Injury to, see CARRIERS 5-14.

PATRONS—

Remedy of, see SCHOOLS AND SCHOOL DISTRICTS 4.

PAYMENT—

See BILLS AND NOTES 6, 7.

Of premiums, see INSURANCE 27.

Recovery of Voluntary Payment.—Payment Under Mistake of Law.

—A voluntary payment can not be recovered even though the claim or demand paid was unjust or illegal, nor can money paid with full knowledge of all the facts and circumstances upon which it was demanded, or with the means of such knowledge, be recovered on the ground that it was paid under the payor's mistaken belief that he was legally bound to pay it.

Parker v. First Nat. Bank, 189, 193 (2).

PEREMPTORY INSTRUCTION—

Refusing to give, is ground for a new trial, see APPEAL 22.

PERSONS—

Injuries to, on tracks, see RAILROADS 37.

Injury to third, see MUNICIPAL CORPORATIONS 25.

PLEADING.

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|-------------------------------|---------------------|
| I. FORM AND ALLEGATIONS, 1, 2 | IV. DEMURRER, 7, 8. |
| II. COMPLAINT, 3-5. | V. MOTIONS. |
| III. ANSWER, 6. | |

I. FORM AND ALLEGATIONS.

1. *Construction*.—A pleading should be reasonably construed as a whole.
Pittsburgh, etc., R. Co. v. Macy, 125, 133 (3).
2. *General Allegations*.—*Averment of Specific Facts*.—Specific facts do not control the general averments of a pleading unless they are contradictory to or inconsistent with such general allegations.
Chicago, etc., R. Co. v. Roth, 161, 164 (1).

II. COMPLAINT.

See ANIMALS; DEATH; INSURANCE 1; MASTER AND SERVANT 11-21; MORTGAGES 11; MUNICIPAL CORPORATIONS 19, 30; NEGLIGENCE 1-5, 9-11; RAILROADS 4-8, 13; WATERS AND WATERCOURSES.

Sufficiency of, see APPEAL 41, 93, 95, 96; MALICIOUS PROSECUTION 1, 2.

To enjoin trustee from erecting high school building, see SCHOOLS AND SCHOOL DISTRICTS 1.

3. *Answer*.—*Ruling on Demurrer*.—Until a good complaint has been placed on file, an answer has no office to perform, and the ruling on a demurrer thereto presents no error.

Almy v. Commercial, etc., Assn., 249, 256 (1).

4. *Theory*.—*Sufficiency*.—A complaint must be good on the theory on which it proceeds, or it will not be good at all, even though it states facts sufficient to be good on some other theory.

Glendenning v. Cowan, 529, 535 (3).

5. *Averments of Fact*.—In an action for damages from alleged negligence of defendants in permitting oil to escape from their premises, allegations in the complaint charging in substance that tanks containing the oil were constructed by defendants and were insecurely and improperly hooped, were statements of ultimate facts susceptible of proof, and were not mere conclusions of the pleader.

Rock Oil Co. v. Brumbaugh, 640, 647 (2).

III. ANSWER.

See CARRIERS 4; RAILROADS 46-50.

When evidence of want of consideration is admissible under the general denial, see CONTRACTS 1.

6. *Non Est Factum*.—*Verified General Denial*.—*Issues Presented*.—*Adoption of City Ordinance*.—A verified general denial performs the office of an answer of *non est factum* in that it puts in issue the execution of the instrument sued on in the broad and comprehensive sense which includes signing, delivery, alteration and anything which goes to show that it is not the instrument of the party sought to be bound, but the filing of a verified general denial to a complaint for personal injuries alleged to have been caused by defendant's violation of a municipal speed ordinance raises no different issue with respect to the ordinance than that which is raised by an ordinary general denial.

Pittsburgh, etc., R. Co. v. Macy, 125, 143 (22).

PLEADING—Continued.**IV. DEMURRER.**

To answer, see **APPEAL** 92-94.

7. *Demurrer to Answer.—Memorandum of Defects.*—Under §344 Burns 1914, Acts 1911 p. 415, a memorandum of defects must accompany a demurrer to an answer.

Boes v. Grand Rapids, etc., R. Co., 271, 276 (5).

8. *Demurrer to Answer in Abatement.—Form.*—A demurrer to an answer or plea in abatement that it does not "state facts sufficient to constitute a cause of defense", is bad in form.

Fender v. Phillips, 85, 91 (1).

V. MOTIONS.

Overruling motion to make specific, see **APPEAL** 19, 20.

POINTS AND AUTHORITIES—

See **APPEAL** 57, 58.

POLICY—

See **INSURANCE** 28.

Construction of, see **INSURANCE** 5.

Validity of, see **INSURANCE** 29.

POSSESSION—

Evidence of, see **BILLS AND NOTES** 1.

PREFERENCES—

Secret, see **COMPOSITIONS WITH CREDITORS** 1, 3.

PREMISES—

Duty of owner or occupant of, see **NEGLIGENCE** 16.

PREMIUMS—

Payment of, see **INSURANCE** 27.

Return of, see **INSURANCE** 9.

PRESUMPTIONS—

See **APPEAL** 97, 103; **INSURANCE** 18; **JURY** 3; **MASTER AND SERVANT** 4; **MUNICIPAL CORPORATIONS** 3, 12; **STREET RAILROADS** 1.

PROBATE COMMISSIONER—

Error of, see **NEW TRIAL** 5.

PROCESS—

See **CORPORATIONS**.

PROPERTY—

Recovery of, sold on foreclosure decree, see **REAL ACTIONS**.

Ownership of the, against which the lien is sought to be enforced, must be shown, see **MECHANICS' LIENS** 1, 2.

PROPERTY—Continued.

1. *Enjoyment of Property Rights.—Liability.*—One is entitled to the reasonable use of his property even if such use incidentally injures the property of his neighbor, but, if his use thereof is unreasonable, liability will arise for such injury as might have been anticipated to result therefrom; and where one brings upon his own premises and keeps there anything likely to cause injury or damage to others if it escapes, he must keep it at his peril, and is *prima facie* answerable for all damage which is the natural consequence of its escape.

Rock Oil Co. v. Brumbaugh, 640, 651 (9).

2. *Real or Personal.—Oil and Gas Leases.—Nature of Lessee's Rights.*—An oil and gas lease granting to lessee all the oil in and under the described land, with the exclusive right to enter at all times for the purpose of drilling and operating for oil or gas, etc., and providing that the grant should be void in case no well was completed within sixty days, unless a specified rental were paid for each six months of delay; that if the first well were a paying well a second should be drilled within sixty days from the completion of the first, and that all additional wells were to be drilled as the first two wells, etc., and granting to the lessee the right to remove his property at any time, though in the first instance amounting merely to a grant of the right to explore, when coupled with the fact that wells were located thereon pursuant to its terms, and in operation, ripened into a conveyance or grant of an interest in land, and such wells, together with the machinery, etc., attached, were real estate, and hence not subject to sale as personal property for nonpayment of taxes.

Johnson v. Sidey, 678, 680 (1).

PROXIMATE CAUSE—

See MASTER AND SERVANT 3; NEGLIGENCE 11, 21, 24.

PUBLIC IMPROVEMENTS—

See MUNICIPAL CORPORATIONS 25-30.

PUBLICATION—

Service by, see CORPORATIONS.

PUPILS—

Illegal transfer of, see SCHOOLS AND SCHOOL DISTRICTS 3.

PURCHASERS—

Rights of, at tax sales, see TAXATION 1, 2.

QUESTIONS FOR JURY—

See CARRIERS 13; MASTER AND SERVANT 25; MUNICIPAL CORPORATIONS 17; RAILROADS 12, 16, 22, 33, 34; STREET RAILROADS 9.

QUIETING TITLE—

See JUDGMENT 5, 6.

RAILROAD—

See WORDS AND PHRASES.

Negligence of, see CARRIERS 10, 11.

Right of way, see ELECTRICITY 3.

Street car company operating cars on a track which crosses the track of a steam, is charged with care proportionate to the danger at the point of crossing, see STREET CARS.

RAILROADS—

1. *Children on Tracks.—Duty of Railroad Company.*—A railroad company owes no duty to keep a lookout for the presence of a child upon its tracks, but after knowledge of its presence, either actual or constructive, the company owes the duty of ordinary care to avoid injuring it.

Cleveland, etc., R. Co. v. Means, 383, 402 (12).

2. *Children on Tracks.—Duty of Railroad Company.*—A railroad company can not assume that a licensee of immature years will look after his own safety and will not place himself in a situation of peril while upon its premises, and constructive knowledge that children of tender age are on its tracks, or probably will be on its tracks at a particular place, carries knowledge of their peril or probable peril and helpless condition, so that in such case the vigilance or care required may become affirmative in character and call for the exercise for the child of the care and vigilance which the company must know that the child can not exercise for itself. (*Cannon v. Cleveland, etc., R. Co.* [1901], 157 Ind. 682, criticised.)

Cleveland, etc., R. Co. v. Means, 383, 405 (13).

3. *Children on Tracks.—Duty of Railroad Company.*—A railroad company is not an insurer of the safety of children who come upon its premises, nor does it at all times and all places owe them the duty of any care, but its duty is simply that which attaches to every member of society undertaking to exercise a personal right in a manner which may affect the welfare or safety of another member, which is the obligation to use reasonable care; and such reasonable care does not impose any duty where the presence of a child on its tracks is merely possible, or where the exercise of such care would impose on the company an unreasonable limitation on the usual and ordinary use of its property.

Cleveland, etc., R. Co. v. Means, 383, 407 (14).

4. *Crossing Accidents.—Complaint.—Sufficiency.*—In an action for injuries received in a crossing accident, where the complaint alleged facts showing that plaintiff stopped, looked and listened before attempting to cross, that the train approached the crossing, which was a street crossing, at a speed of fifty miles per hour, that there were obstructions to plaintiff's view, that defendant negligently failed to sound the whistle at a distance of eighty to one hundred rods from the crossing, and failed to ring the bell, or otherwise signal the approach of the train, etc., the averments sufficiently showed a duty owing by defendant to plaintiff to operate its train at a lawful rate of speed and to signal its approach to the crossing as required by law, were sufficient to charge actionable negligence in failing to do so, and did not show that plaintiff was guilty of contributory negligence.

Pittsburgh, etc., R. Co. v. Macy, 125, 133 (4) 134 (4).

RAILROADS—Continued.

5. *Crossing Accidents.—Specific Acts of Negligence.—Complaint.—Sufficiency.*—In a complaint for injuries caused by being struck at a street crossing by a hand car operated over defendant's street car track, the general allegation that defendant negligently and carelessly ran and operated said hand car, was not controlled or eliminated by further allegations that defendant negligently and carelessly failed to equip said hand car with an efficient brake, negligently failed to signal its approach to the crossing, and negligently failed to equip it with any device for signalling its approach to the crossing, but the latter were simply additional charges which in no way contradicted or nullified the general charge of negligent operation.

Chicago, etc., R. Co. v. Roth, 161, 164 (2).

6. *Crossing Accidents.—Failure to Signal Approach to Crossing.—Complaint.*—A complaint for injuries sustained by being struck by a train at a public crossing, charging negligence in failing to signal the approach of the train by sounding the whistle or ringing the bell as required by §5431 Burns 1914, §4020 R. S. 1881, was not open to the objection that the facts pleaded did not show a duty owing from defendant to the plaintiff, on the theory that the statute applies only to such trains as approach the crossing from a point distant therefrom equal to the distance defined by the statute, where the necessary and only reasonable inference to be drawn from the facts alleged was that defendant's train approached the crossing from a point more than eighty rods distant therefrom. *Pittsburgh, etc., R. Co. v. Macy*, 125, 133 (2).

7. *Crossing Accidents.—Negligence.—Complaint.*—A complaint for death resulting from a railroad crossing accident, charging that defendant's servants negligently failed to ring the bell or blow the whistle as required by law on approaching such crossing, that such servants, knowing that the view of a traveler on the highway was completely obstructed by standing cars, negligently failed to give any warning of the approach of the train, and that, knowing the character of the crossing and its use by many people, they negligently failed to give any signal whatever of the approach of the train, and negligently ran the same at a high and dangerous rate of speed, etc., whereby plaintiff was killed, while evidencing an intent to charge three distinct acts of negligence, can not be said to proceed upon the theory that the death was caused by a combination of the acts of negligence alleged, and would be sufficient with no other averments of negligence save those relating to failure to give the statutory signals.

Pittsburgh, etc., R. Co. v. Ervington, 371, 374 (1), 377 (1).

8. *Crossing Accidents.—Failure to Give Signals.—Complaint.—Ability to Hear Signals.*—In an action to recover for death resulting from a railroad crossing accident, where the negligence charged is a failure to give the statutory signals of the approach of the train to the crossing, plaintiff need not allege that decedent was in a position to have heard the signals if they had been given. *Pittsburgh, etc., R. Co. v. Ervington*, 371, 377 (3).

9. *Crossing Accidents.—Failure to Signal Approach to Crossing.—Liability.—Statutes.*—Under §5431 Burns 1914, §4020 R. S. 1881, it is not essential to the sufficiency of a complaint, to show the liability of a railroad company for injuries in a crossing accident resulting from a failure to sound the whistle or ring the bell as therein provided, that it contain allegations showing that the

RAILROADS—Continued.

train approached the crossing from a point eighty rods distant therefrom.
Pittsburgh, etc., R. Co. v. Macy, 125, 132 (1).

10. *Crossing Accidents.—Contributory Negligence.*—Whether a person killed in a railroad crossing accident was guilty of contributory negligence must be determined from all the facts and circumstances surrounding him at the time he was required to act, and from a consideration of whether, so circumstanced and situated, he exercised the kind and degree of care that would be used by an ordinarily prudent person.

Lutz v. Cleveland, etc., R. Co., 16, 23 (4).

11. *Crossing Accidents.—Duty of Traveler.—Contributory Negligence.—Burden of Proof.*—A traveler approaching a railroad crossing over the highway is chargeable only with the exercise of ordinary care under all the circumstances, and the burden of proving his contributory negligence is upon the defendant.

Pittsburgh, etc., R. Co. v. Ervington, 371, 380 (8).

12. *Crossing Accidents.—Contributory Negligence.—Jury Question.*—Where there is evidence to show that a traveler exercised some care in attempting to cross a railroad track, and that there were obstructions to his view and conditions which rendered hearing difficult, or where there is a controversy in the evidence as to whether any care was used, or as to the *quantum* of care, or where the facts are such as to warrant the drawing of different inferences as to the exercise of care, or want of care, the question of contributory negligence is for the jury.

Pittsburgh, etc., R. Co. v. Macy, 125, 136 (12).

13. *Crossing Accidents.—Contributory Negligence.—Complaint.*—A complaint to recover for death in a railroad crossing accident, charging negligence in failing to signal the approach of the train as required by statute, in failing to give any warning of its approach, and in operating the train at an excessive speed, and from which it appears that as decedent approached the crossing his view was obstructed until the horse reached the main track, that within 100 feet of the crossing decedent stopped, looked and listened, and continued to look and listen until he was upon the main track, but that he could neither hear nor see the train until he was upon the main track, etc., is not objectionable as showing that decedent was guilty of contributory negligence.

Pittsburgh, etc., R. Co. v. Ervington, 371, 377 (4).

14. *Crossing Accidents.—Contributory Negligence.—Answers to Interrogatories.*—In an action for the death of a person killed at a railroad crossing, the burden on the question of contributory negligence was on defendant, and, since the verdict was a finding for plaintiff on that issue, the answers of the jury to interrogatories on that subject, to be sufficient to overcome the verdict, must be such as to affirmatively show a state of facts which compels the conclusion that decedent was guilty of negligence contributing to her injury and death, regardless of any evidence that might have been introduced tending to support the verdict, or tending to explain such answers and reconcile them with the verdict.

Lutz v. Cleveland, etc., R. Co., 16, 23 (3).

15. *Crossing Accidents.—Contributory Negligence.—Knowledge of Conditions.—Evidence.*—In an action for the death of a traveler at a railroad crossing, the fact that shortly before the accident decedent had passed over the crossing and knew something of the conditions surrounding it, would not of itself charge him

RAILROADS—Continued.

conclusively with contributory negligence in attempting to cross later, but the question would necessarily depend on all the facts and circumstances surrounding the crossing and the amount of care exercised by him, and in view of a failure of the evidence to show that the crossing was so dangerous that a man of ordinary prudence might have reasonably supposed that in the exercise of ordinary care on his part, and the giving of proper signals on defendant's part, he could cross in safety, the jury's finding that he was not guilty of contributory negligence can not be disturbed on the ground that the evidence is insufficient.

Pittsburgh, etc., R. Co. v. Ervington, 371, 381 (11).

16. *Crossing Accidents.—Evidence.—Contributory Negligence.—Jury Question.*—In an action for death in a railroad crossing accident, where it was conceded that the statutory signals of the approach of the train were not given, and the evidence showed the condition of the crossing to be such that an approaching train could not be seen by decedent until he was upon the track, because of standing cars and a curve in the track, that decedent stopped, looked and listened when 100 feet from the crossing, and, neither hearing nor seeing an approaching train, continued toward the crossing constantly looking and listening, etc., the court can not say as a matter of law that decedent necessarily saw or heard the approaching train in time to avoid the collision, but the question was for the jury and it was warranted in finding that decedent's death happened in the manner indicated and was the result of the negligent failure to give the statutory signals. *Pittsburgh, etc., R. Co. v. Ervington*, 371, 380 (9), 381 (9).

17. *Crossing Accidents.—Contributory Negligence.—Answers to Interrogatories.*—In an action for injuries sustained at a street crossing by the rider of a bicycle, who was struck by a hand car operated on defendant's street car track, where the complaint, in addition to averments of specific acts of negligence, averred generally that defendant was negligent in the operation of the hand car, answers by the jury to interrogatories showing that plaintiff, approaching from the west, looked both north and south and saw no car approaching; that he rode between two vehicles which obstructed his view just before he reached the tracks; that the car approached from the south on the west track instead of the east track, which was the track customarily used for north bound cars; that after passing the vehicles plaintiff saw the car for the first time, and he was then on the west track; that the car approached at a dangerous rate of speed and no effort was made to slacken its speed, and that plaintiff used ordinary care, etc.; do not show that plaintiff was guilty of contributory negligence, and they sustain rather than contradict the general verdict for plaintiff.

Chicago, etc., R. Co. v. Roth, 161, 164 (3).

18. *Crossing Accidents.—Contributory Negligence.—Answers to Interrogatories.*—In an action for the death of an old lady who was struck by defendant's train at a street crossing, where the answers to interrogatories did not dispute the finding of the general verdict that decedent looked and listened before attempting to cross the tracks, and neither heard nor saw any approaching train, but showed that after crossing the tracks she walked along the side thereof in the direction of the approaching train, and that the train, which was approaching at forty to fifty miles an hour, could then have been seen for a distance of 800 feet, were insuffi-

RAILROADS—Continued.

cient to overcome the general verdict on the ground of contributory negligence, in the absence of any finding as to how long decedent faced in the direction of the approaching train, or as to what caused her to face in that direction, the distance she walked parallel to the track, or where she was when she first saw the train, and in view of her advanced age, the facts and circumstances surrounding her at the time, and the fact that evidence might have been introduced that would have completely exonerated her from any inference of contributory negligence.

Lutz v. Cleveland, etc., R. Co., 16, 23 (5).

19. *Crossing Accidents.—Failure to Signal Approach of Train.—Private Crossing.—Dedication to Public Use.—Evidence.*—Where it was conceded in an action for the death of plaintiff's decedent in a crossing accident that the statutory signals were not given as the train approached the crossing, the evidence was not insufficient to sustain a verdict for plaintiff on the theory that the crossing was a private crossing to which the statutory provision for signalling does not apply, where there was evidence to show that the accident occurred near the corporate limits of a city, that though the crossing was originally constructed as a private crossing for the person then owning all the surrounding land, it was later planked and graded and approaches and a wing fence were made, and a gate removed, that the then owner of the land sold same to various grantees, reserving in each of the deeds thirty feet on each side of the center line of the traveled way leading to and over such crossing so that a street would be provided for, and that such street was improved in the usual manner and used indiscriminately by the public.

Pittsburgh, etc., R. Co. v. Ervington, 371, 378 (5), 380 (5).

20. *Crossing Accidents.—Character of Crossing.—Evidence.*—In an action for death in a railroad crossing accident, grounded on a negligent failure to give the statutory signals of the train's approach, communications in the nature of self-serving declarations or secret instructions between defendant and its section foreman relative to the character of the crossing, to show that it was a private crossing, were properly excluded, since such communications could not affect the legitimate conclusions properly to be deduced from the open conduct of defendant.

Pittsburgh, etc., R. Co. v. Ervington, 371, 382 (12).

21. *Crossing Accidents.—Evidence.—Manner of Traveler's Death.*—In an action to recover for death of a traveler at a railroad crossing, plaintiff need not show by eye witnesses just how the decedent met his death, but it is sufficient if the evidence taken as an entirety supports the theory of the complaint, and the hypothesis which it is adduced to prove, and it is for the jury to determine the reasonable probability of the truth of all the evidence presented. *Pittsburgh, etc., R. Co. v. Ervington*, 371, 381 (10).

22. *Crossing Accidents.—Evidence.—Contributory Negligence.—Jury Question.*—In an action for injuries to plaintiff while attempting to cross defendant's railroad tracks, where there was evidence to the effect that plaintiff stopped and waited until the east bound train had cleared the crossing; that he looked east and neither saw nor heard an approaching train; that the train going west approached the crossing at about thirty miles per hour without ringing the bell or sounding the whistle; that as the east bound train cleared the track he saw a pedestrian starting to cross the track coming toward him, whereupon he

RAILROADS—Continued.

drove his horse onto the crossing, still looking to the east, and just as he entered upon the main track he saw an approaching train; that he instantly endeavored to back off the track, but was unable to do so, etc., the court can not say that the plaintiff was guilty of contributory negligence as a matter of law, and, the question being one of fact for the jury, its verdict finding him free from such negligence was supported by the evidence, though there was evidence warranting a contrary finding.

Pittsburgh, etc., R. Co. v. Macy, 125, 144 (23).

23. *Crossing Accidents.—Evidence.—Admissibility of Speed Ordinance.—Sufficiency of Identification.*—In an action for injuries sustained in collision with a train at a street crossing, where it was charged that the train was being operated in excess of the speed allowed by ordinance, the ordinance and the minutes of the proceedings connected with its passage were competent under the issues, and sufficiently identified to warrant their admission in evidence, where it appeared that the ordinance was enacted in 1885, that it declared an emergency and stated that it would be in full force and effect from its passage, and the minutes showing its adoption and bearing the signatures of the proper officers, together with the page of the ordinance book where the ordinance was recorded, etc., were identified by the town clerk. *Pittsburgh, etc., R. Co. v. Macy*, 125, 141 (18), 142 (18).

24. *Crossing Accidents.—Issues.—Existence of Speed Ordinance.—Right to Rely on Obedience to Ordinance.—Instructions.*—Where the complaint in an action for injuries in a crossing accident alleged that the train approached the crossing at a speed in excess of that provided by an ordinance of the municipality, such complaint and the answer in general denial put in issue the fact that there was such an ordinance, duly enacted and in force, at the time of the injury, and such ordinance was admitted in evidence on what the court deemed sufficient *prima facie* proof of its passage, an instruction that if the jury found that such an ordinance was at the time in force, the plaintiff had a right to presume and rely on the presumption that defendant would not violate it, etc., was not erroneous and was properly within the issues and proof.

Pittsburgh, etc., R. Co. v. Macy, 125, 138 (13).

25. *Crossing Accidents.—Instructions.*—In an action for injuries sustained in a crossing accident, where negligence was charged in defendant's failure to give warning of the approach of the train to the crossing, and the evidence conclusively showed that plaintiff was a traveler upon the highway and was struck by defendant's train, an instruction stating that "in actions for damages on the ground of negligence alleged" certain things are necessary to recovery, was not erroneous for failure to mention the duty owing by defendant to the plaintiff, especially in view of other instructions defining negligence as applied to the averments of the complaint and informing the jury that before plaintiff could recover he was required to prove the material allegations of his complaint by a fair preponderance of the evidence.

Pittsburgh, etc., R. Co. v. Macy, 125, 135 (8).

26. *Crossing Signals.—Statutes.—Street Crossings.*—The statutory provisions requiring the giving of signals on the approach of a train to a highway crossing apply also to street crossings within the corporate limits of a town, in the absence of an ordinance providing different regulations.

Pittsburgh, etc., R. Co. v. Macy, 125, 134 (6).

RAILROADS—Continued.

27. *Failure to Give Crossing Signals.—Liability.*—A failure to give the signals required by law on the approach of a train to a highway crossing is negligence *per se*, rendering the company liable for injuries proximately resulting therefrom.
Pittsburgh, etc., R. Co. v. Macy, 125, 134 (5).
28. *Injuries to Animals on Tracks.—Liability.—Negligent or Wilful Injuries.*—The liability of a railroad company for injuries to animals, alleged to have been either negligently or wilfully inflicted, is not affected by the rule that to recover under the statute the evidence must show actual contact with the animals.
Chicago, etc., R. Co. v. Leiter, 212, 216 (5).
29. *Injuries to Animals on Tracks.—Evidence.—Contributory Negligence.*—Where the evidence, in an action against a railroad company for damages for killing plaintiff's horses, showed that the horses were kept in a field surrounded by a substantial fence, and that the horses were not of a character such that contributory negligence could be imputed to plaintiff by reason of pasturing them in the field from which they escaped, liability of the defendant could not be avoided on the ground of contributory negligence.
Chicago, etc., R. Co. v. Leiter, 212, 215 (2).
30. *Injuries to Animals on Tracks.—Damages.—Interest.*—In an action for damages for the loss of plaintiff's horses killed by defendant's train, where the evidence showed their value was \$650, a verdict for \$700 was not excessive in view of the fact that interest on the value of the horses was recoverable from the date of filing the complaint, which in separate paragraphs charged negligence and wilful injuries respectively, and the interest from that date to the returning of the verdict was more than \$50.
Chicago, etc., R. Co. v. Leiter, 212, 217 (6).
31. *Injuries to Animals on Tracks.—Negligence.—Wilful Injuries.—Evidence.*—Where the evidence showed that plaintiff's horses were seen on defendant's tracks by those in charge of its train in time to have slackened the speed, or to have stopped the train, so as to avoid the injuries, but that they failed to do so, and that such could have been done without peril to persons or property entrusted to defendant for transportation, it was for the jury to determine whether defendant was negligent, or whether it was liable for wilful injuries, so that a verdict for plaintiff was not without evidence to support it on either theory.
Chicago, etc., R. Co. v. Leiter, 212, 216 (4).
32. *Injuries to Animals on Tracks.—Negligence.—Wilful Injuries.—Evidence.*—Evidence showing that plaintiff's horses were kept in a field, securely fenced, from which they escaped and entered upon defendant's railroad track at a point where defendant had removed a cattle guard and highway wing fence, that the horses ran along the track in front of an approaching train and were overtaken at a bridge some distance from where they entered on the track, and that the engineer and fireman saw them and could have prevented the injury by stopping the train, but, instead of stopping it or slackening the speed, continued to blow the whistle and pursue the horses until the injuries occurred, not only tended to support a charge of negligence, but also tended to support the theory of wilful injury.
Chicago, etc., R. Co. v. Leiter, 212, 214 (1), 215 (1).
33. *Injuries to Children on Tracks.—Contributory Negligence.—Jury Question.*—The questions of whether a mother was negligent in permitting her five-year-old child to go to a public park

RAILROADS—Continued.

near a railroad switch track in the care of his twelve-year-old brother, and whether the brother was negligent in going upon the switch track, were for the jury, in view of evidence to support the averments of the complaint as to such questions.

Cleveland, etc., R. Co. v. Means, 383, 411 (16).

34. *Injuries to Children on Tracks.—Jury Questions.*—Where a railroad company was charged with constructive knowledge of the presence of children on its switch track and there was evidence to show that before moving one of its cars standing thereon, no signal or warning of any kind was given, the question of whether it exercised the degree of care that an ordinarily prudent person would have exercised, and whether the lack of such care was the proximate cause of the death of one of the children, were questions of fact for the jury.

Cleveland, etc., R. Co. v. Means, 383, 411 (15).

35. *Injuries to Children on Tracks.—Constructive Notice.—Duty of Railroad Company.*—Where a railroad switch was maintained near a public park in a densely populated part of a city to which children from the park and immediate vicinity were attracted by wheat which had leaked from cars, and such condition had existed for several years and was known, or by the use of reasonable diligence could have been known to the company, it owed to a five-year-old boy, attracted there by other boys gathering wheat, the duty to exercise ordinary care before moving cars standing on such switch, regardless of whether he was a trespasser, or a licensee by permission or invitation, or whether the case was within either the last clear chance or attractive nuisance doctrine, since the company had at least constructive knowledge of his presence in a situation of peril from which he was unable by reason of his infancy to extricate himself.

Cleveland, etc., R. Co. v. Means, 383, 387 (2), 395 (2), 399 (2), 408 (2).

36. *Injuries to Persons on Tracks.—Negligence.—Answers to Interrogatories.—Contributory Negligence.*—In an action against an interurban railroad company for injuries sustained by plaintiff, a woman of mature years, while waiting for the car to stop, where the complaint alleged that plaintiff attempted to hail the car at a rural stop before daylight in the morning, and charged negligence in operating the car without a headlight and at an excessive speed, and alleged that it did not stop and that in passing plaintiff's coat was caught on the car and she was thrown to the ground, etc., but failed to allege any facts to show that her signals were seen, or to justify her in the belief that the car was going to stop, it must be assumed that the signals were not seen by the motorman and that plaintiff was not warranted in believing that the car would stop; hence on answers by the jury to interrogatories showing that she stood from 18 inches to two feet from the ends of the ties as the car passed, and that there was nothing to prevent her from standing at a safe distance, and that as the car passed her coat was caught and she was thrown, etc., plaintiff was chargeable with contributory negligence as a matter of law.

Eckhart v. Marion, etc., Fraction Co., 217, 221 (4), 222 (4), 225 (4).

37. *Licensees.*—Licensees of a railroad company are persons who, being neither passengers, servants or trespassers, nor persons in any contractual relation to the company, are permitted to

RAILROADS—Continued.

- be upon its premises for their own interests, convenience or gratification. *Cleveland, etc., R. Co. v. Means*, 383, 393 (7).
38. *Operation.—Duty to Give Crossing Signals.*—Independently of statute or ordinance, it is the duty of a railroad company to give timely warning of the approach of its train to the crossing of a public street. *Pittsburgh, etc., R. Co. v. Macy*, 125, 134 (7).
39. *Relief Association.—Contracts.—Validity.*—Under §5308 Burns 1914, Acts 1907 p. 46, any contract of membership in a relief association maintained by a railroad company, whereby the member in any manner agrees to surrender or waive any right of damage against the railroad company on account of personal injury or death, is null and void; hence an answer setting up such a contract and the acceptance of benefits thereunder did not state facts constituting a defense to an action for damages to an injured employee.
Boes v. Grand Rapids, etc., R. Co., 271, 275 (3), 276 (3).
40. *Relief Associations.—Recovery of Wages Applied to Dues.*—A contract of membership in a railroad relief association entered into in 1909 in violation of §5308 Burns 1914, Acts 1907 p. 46, was null and void from its inception, so that the fact that the railroad company had applied wages withheld from plaintiff to the payment of his dues in such association was no bar to an action by plaintiff for the recovery of the wages so withheld; plaintiff having received no benefits from the association and having done nothing to operate as an estoppel.
Acton v. Baltimore, etc., R. Co., 280.
41. *Right of Way.—Effect of Grant.—Ownership of Fee.*—The grant of a railroad right of way is the grant of an easement and implies that the fee remains in the grantor.
Muncie Electric Light Co. v. Joliff, 349, 355 (5).
42. *Right of Way.—Statutory Provisions.*—Under the acts of 1832 and 1848 (Local Laws 1832 p. 173, §15; Local Laws 1848 p. 432, §14), relating to the acquisition of rights of ways by railroad companies, etc., and providing that all contracts, relinquishments, grants, etc., shall be fully and plainly made in writing, and signed by the party making the same, did not have the effect of making all such transactions invalid if not made in writing, but merely rendered them unenforceable in actions at law by the railroad company against the landowner.
Town of Newport v. Cleveland, etc., R. Co., 147, 156 (4).
43. *Right of Way.—Dedication for Highway.—Crossing.*—In determining whether a part of a railroad right of way has been dedicated to the public for a highway the same principles are applied as in determining such question in the case of a private landowner, and where a railroad company by its conduct has indicated an intention to dedicate land to the public for a crossing, and others have in good faith acted upon the open evidence of such intention, any other secret intention will not prevail against the actual result of its own open conduct upon which the public has relied and acted accordingly.
Pittsburgh, etc., R. Co. v. Ervington, 371, 379 (7).
44. *Street Railroads.—Care in Approaching Crossing.*—The rules applicable to a person crossing over the track of a steam railway do not apply in all their strictness to persons crossing the tracks of a street railway in a city.
Chicago, etc., R. Co. v. Roth, 161, 165 (4).

RAILROADS—Continued.

45. *Township Aid.—Expense of Election.—Statutes.*—The provisions of §5488 Burns 1914, Acts 1869 (s.s.) p. 92, providing that should an election to vote aid to a railroad result in favor of the railroad appropriation, the expenses of the election, after being paid by the county or township, as the case may be, shall be charged against the railroad company, etc., govern the payment of the expenses incurred in a special township election held to vote aid to an interurban railroad, and, when considered in the light of the original act for voting aid to railroads (Acts 1869 [s.s.] p. 92) and the amendments thereto, require that the expenses of such an election, if not held in the entire county, shall be paid by the particular township or townships in which the election is held. (*Board, etc. v. Center Tp.* [1888], 107 Ind. 584, distinguished.) *Board, etc. v. Johnson*, 112.
46. *Use of Street for Right of Way.—Action.—Answer.*—In an action for mandatory injunction to prevent the use and occupancy of a street for railroad purposes, an answer alleging that the land was obtained by defendant's predecessors by grant long before the town was established, etc., was not objectionable on the theory that such grant was unenforceable if not in writing, where it appeared that the grant or gift had been executed. *Town of Newpoint v. Cleveland, etc., R. Co.*, 147, 157 (5).
47. *Use of Street for Right of Way.—Action.—Answer of Title.—Necessity of Setting Out Deed.*—In an action for mandatory injunction to prevent the use and occupancy of a street for railroad purposes, an answer by the railroad company averring the acquisition of the right of way by grant long before the establishment of the town was not insufficient for failure to set out the deed or grant relied on, since such deed or grant constituted merely the evidence of title and was not required to be pleaded. *Town of Newpoint v. Cleveland, etc., R. Co.*, 147, 156 (3).
48. *Use of Street for Right of Way.—Action.—Answer.—Sufficiency.*—In an action for mandatory injunction to prevent the use and occupancy of a street for railroad purposes, an answer averring facts to show that the original owners of the land occupied by the street had estopped themselves from asserting title against defendant's predecessors, and that any right acquired by plaintiff town in such right of way as a street was subject to defendant's right, was not open to the objection that it was insufficient for failure to show that such right of way was obtained from the original owners in writing. *Town of Newpoint v. Cleveland, etc., R. Co.*, 147, 157 (6).
49. *Use of Street for Right of Way.—Action.—Adverse Possession.—License.—Answer.*—The objection, in an action for mandatory injunction to prevent the use and occupancy of a street for railroad purposes that it is was not alleged that defendant's right of way was obtained in writing from the landowner, was not applicable to an answer showing the acquisition of a right of way by adverse possession over the land occupied by the street, nor to a paragraph of answer showing that defendant acquired its right of way by license. *Town of Newpoint v. Cleveland, etc., R. Co.*, 147, 157 (7).
50. *Use of Street for Right of Way.—Action.—Answer.—Sufficiency.—"Grant".*—In an action for mandatory injunction, to prevent the occupancy and use of a street for railroad purposes, a paragraph of answer on the theory that the right of way over the land occupied by the street had been obtained by defendant's

RAILROADS—Continued.

predecessors, long before the town came into existence, pursuant to an act of 1832 (Local Laws 1832 p. 173, §15), and an act of 1848 (Local Laws 1848 p. 432, §14), from the original owners thereof who "gave and granted" to its predecessors the right to take and occupy the ground, etc., was not open to the objection that it failed to aver that such right of way was obtained in writing, since the word "grant" implies a conveyance in writing, and especially in view of the character of the action and the existence of averments justifying the inference that such land was obtained by an instrument in writing.

Town of Newport v. Cleveland, etc., R. Co., 147, 155 (2), 156 (2).

REAL ACTIONS—

Recovery of Property Sold on Foreclosure Decree.—Limitation of Actions.—Statutes.—Subdivision 3, §295 Burns 1914, §293 R. S. 1881, providing that actions for the recovery of real property sold on execution shall be brought within ten years after the sale, renders the title of the purchaser at such sale impervious to attack after the expiration of ten years by the execution debtor or anyone claiming under him, even though the sale may have been utterly invalid, and the statute also applies to sales made on foreclosure decrees; hence where the purchaser at a foreclosure sale immediately took possession and he and his grantees continued in open and notorious possession for more than ten years without being disturbed, their title and right of possession was protected as against one claiming under a corporation that owned the property at the time of the sale, even though the decree was taken by default on alleged defective service by publication.

Frankel v. Voss, 175, 180 (4).

RECORD—

Unauthorized change in, see **APPEAL 62.**

Instrument Not Entitled to be Recorded.—Notice.—Under §3905 Burns 1914, any conveyance or instrument in writing, to be entitled to be placed of record, must be acknowledged by the grantor, and if copied into the record without such acknowledgment, the record is not notice to any one without actual knowledge.

Bledsoe v. Ross, 609, 612 (1).

REHEARING—

Concerning, see **APPEAL 12.**

RELEASE—

Of principal, see **MORTGAGES 8.**

RELIEF ASSOCIATIONS—

See **RAILROADS 39, 40.**

REMITTITUR—

See **APPEAL 134; TRIAL 2.**

Entry of, see **APPEAL 107.**

RESCISSION—

See **INSURANCE 9-11.**

REVERSAL—

See APPEAL 136, 137.

REVIEW—

As to evidence, see APPEAL 65-72.

As to instructions, see APPEAL 73-91.

As to pleadings, see APPEAL 92-99.

RIGHT OF WAY—

See RAILROADS 41-43.

Railroad, see ELECTRICITY 3.

Use of street for, see RAILROADS 40-50.

"ROADS"—

See WORDS AND PHRASES.

SALES—

Tax, see TAXATION 1, 2.

Action for Breach of Warranty.—Instructions.—Assumption of Facts.—In an action for breach of warranty in the sale of a horse, an instruction that if the jury found from a preponderance of the evidence, that plaintiff was entitled to recover, it was then its duty to assess the amount of the damages not exceeding the amount demanded, and that the measure of damages, if it was found that plaintiff was entitled to recover, would be the difference between the fair cash value of the animal at the time and place of sale, if in the condition as warranted, and the fair cash value of the animal as it really existed, was not, when considered as a whole, fatal on the objection that it assumed the existence of a warranty and was therefore misleading.

Blair Baker Horse Co. v. Railroad Transfer Co., 505, 511 (6), 512 (6).

SCHOOLS AND SCHOOL DISTRICTS—

1. *Erection of High School Building.—Complaint to Enjoin Trustee.—Averments as to Indebtedness.*—In a suit to enjoin a township trustee from erecting a township high school building under §§6584b, 6584c Burns 1914, Acts 1913 p. 331, the averment of the complaint, "that if said defendant is permitted to construct said school building the cost thereof will far exceed the indebtedness allowed by law", was merely a conclusion of the pleader, and not equivalent to an averment of facts showing that the township by building such building would incur an indebtedness in excess of that permitted by the Constitution.

Glendenning v. Cowan, 529, 536 (5).

2. *Erection of High School.—Statutes.—Complaint to Enjoin Trustee.*—Under §§6584b, 6584c Burns 1914, Acts 1913 p. 331, relating to the erection of township high schools where for two years last past there were eight or more graduates of the elementary grades, the trustee may establish a high school if the township has no township, city or town high school, and the tax valuation is \$600,000 or more; and he must establish such school under such conditions if petitioned to do so by a majority of the patrons, or, in the absence of such petition, if there is also no high school within three miles of any boundary of the township; hence, a

SCHOOLS AND SCHOOL DISTRICTS—Continued.

complaint to enjoin the trustee of a township from constructing a high school building under such statute was insufficient in the absence of any averment to show that there was already an established high school in the township.

Glendenning v. Cowan, 529, 532 (2).

3. *Illegal Transfer of Pupils.—Injunction.*—An action by a school township to enjoin the county superintendent from illegally transferring township pupils to the schools of a school city, and to enjoin the latter from accepting such transfers and charging the *per capita* cost to the township, can not be maintained, since, if the transfers are illegal, such fact would be available as a complete defense in any action against the school township for the cost of educating such pupils in the school city.

Jeffersonville School Tp. v. School City, etc., 83, 84 (1).

4. *School Buildings.—Duty of Township Trustee.—Remedy of Patrons.*—A suit to enjoin the erection of a school building on an existing site will not lie against the township trustee, since, under §6410 Burns 1914, Acts 1901 p. 514, it is the duty of such officer to provide necessary school buildings, and the only remedy of one opposed to the erection of a building under such circumstances is by appeal to the county superintendent.

Glendenning v. Cowan, 529, 535 (4).

SECURITY—

Power to require additional, see **GUARDIAN AND WARD** 1.

SETTLEMENT—

Of claims, see **EXECUTORS AND ADMINISTRATORS** 5, 7, 8.

SEWERS—

A city will be presumed to be incorporated under the laws of the State so as to be authorized to construct see **MUNICIPAL CORPORATIONS** 3.

SIDEWALKS—

Defective, see **MUNICIPAL CORPORATIONS** 16-22.

Defective streets and, see **MUNICIPAL CORPORATIONS** 1, 2.

SIGNALS—

Crossing, see **RAILROADS** 26.

Duty to give crossing, see **RAILROADS** 38.

Failure to give, see **RAILROADS** 6, 8, 9, 19, 27.

SIGNATURE—

Of attorneys to assignment of errors, see **APPEAL** 42.

SPECIFIC PERFORMANCE—

1. *Conditions Precedent.—Necessity for Notice or Demand.—Tender.*—Notice or demand to convey and a tender of the purchase price is not required as a condition precedent to a suit for specific performance of a contract for the sale of real estate, where the vendor evinces an intention not to perform and denies the right of the purchaser to enforce the conveyance in pursuance to such contract.

Bronnenberg v. Indiana Union Traction Co., 495, 499 (4).

SCHOOLS AND SCHOOL DISTRICTS—Continued.

2. *Contract to Sell Real Estate.—Tenants in Common.—Notice.—Sufficiency.*—In a suit against tenants in common for the specific performance of a contract to convey, where it was conceded that there was a tender and demand made on one of the defendants, the notice was sufficient to sustain a decree even though there was no evidence of a similar tender or demand as to the other defendants, since where tenants in common are jointly pursuing a common purpose of selling, leasing or managing their real estate, notice to one in matters pertaining thereto is notice to all.
Bronnenberg v. Indiana Union Traction Co., 495, 499 (3).

SPEED—

Admissibility of, ordinance, see RAILROADS 23.

Ordinance, see RAILROADS 24.

STATUTES—

See ACTION; APPEAL 28; GUARDIAN AND WARD 3; MASTER AND SERVANT 14, 29, 30; MECHANICS' LIENS 5, 6; MUNICIPAL CORPORATIONS 11, 23, 24; NEW TRIAL 7; RAILROADS 9, 26, 45; REAL ACTIONS; SCHOOLS AND SCHOOL DISTRICTS 2; VENUE 1.

1. *Construction.—Legislative Intent.*—In interpreting a statute and giving meaning to any particular words, phrases or sentences therein, due regard must be had to the entire context, and that meaning should be adopted which best harmonizes with all parts of the statute; and the intent of the legislature should also be of controlling influence where the words of the act are such as to permit the carrying out of such intent.

Muncie Electric Light Co. v. Joliff, 349, 362 (14).

2. *Construction.—Reenactment.*—Where a statute has been construed by the Supreme Court the subsequent reenactment thereof will be deemed to have included the legislative adoption of such construction, unless a clear intent to the contrary is manifested by the statute as reenacted.

Muncie Electric Light Co. v. Joliff, 349, 360 (13).

STOCK—

In trade, see CHATTEL MORTGAGES 6.

STREET CARS—

Crossing Steam Road.—Care Required.—A street car company operating cars on a track which crosses the track of a steam railroad is charged with care proportionate to the danger at the point of crossing.
Vincennes Traction Co. v. Curry, 683, 690 (3).

STREETS—

See MUNICIPAL CORPORATIONS 26, 27, 29, 30.

Collision on, see NEGLIGENCE 1, 2.

Defective, and sidewalks, see MUNICIPAL CORPORATIONS 1, 2.

Opening, see MUNICIPAL CORPORATIONS 8-11.

Use of, for right of way, see RAILROADS 46-50.

STREET RAILROADS—

See CARRIERS 3; RAILROADS 44.

Liability of, see MUNICIPAL CORPORATIONS 30.

STREET RAILROADS—Continued.

1. *Crossing Accidents.—Negligence.—Presumptions.—Instructions.*
—Where a traveler is injured by a car at a public street crossing there is no presumption, in the absence of evidence, either for or against negligence, and the rule applicable to the crossings of steam roads generally is not applicable to an interurban road at a crossing in an incorporated town; hence, in an action against an interurban railroad company, an instruction stating the reverse of such propositions, and susceptible to the interpretation that plaintiff was guilty of contributory negligence as a matter of law if he did not see the car that struck him in time to avoid the injury, was properly refused.
Indiana Union Traction Co. v. Cauldwell, 513, 515 (3).
2. *Crossing Accidents.—Instructions.*—In an action for injuries sustained in colliding with an interurban car at a street crossing, an instruction that if it was found that plaintiff attempted to cross the track in front of defendant's car, and that prior to such attempt, if any, he saw the car approaching, the mere fact that at the time of his attempt to cross he could see it approaching would not in itself establish contributory negligence, and that in order to establish contributory negligence the car must have been approaching in such close proximity to plaintiff, that taking into account the rate of speed allowed by ordinance, if there was such ordinance in force, and under the then present condition of the apparent rate of speed, a reasonably prudent man would not attempt to cross the track, was not objectionable on the ground that it in effect states that plaintiff could cross in front of a rapidly approaching car with impunity disregarding the evidence of his senses that the car was going so rapidly that it would inevitably hit him if he tried to cross, although it is not to be unqualifiedly approved and may be subject to other objections not raised. *Indiana Union Traction Co. v. Cauldwell*, 513, 516 (4).
3. *Crossings Over Steam Roads.—Relative Duties.*—In the absence of statutory regulation there is a difference between the duties required of the servants of a steam railroad and those of a street railroad in approaching a crossing where the view is obstructed, in that the circumstances and conditions may require that the street railway employe shall stop the car before going on the crossing, and, if necessary, go forward to a place where he can determine if it is safe to proceed, by looking and listening for an approaching train, while under the same circumstances and conditions the employes of the steam railroad are not required to stop the train, but are only required to look and listen, to give proper signals, and to use the care commensurate with the danger.
Vincennes Traction Co. v. Curry, 683, 691 (7).
4. *Crossing Steam Road.—Care Required.*—The same character and degree of care to avoid a collision must be exercised by those operating an electric car in approaching and going over a steam railroad crossing as is required to be exercised by one driving or operating an ordinary vehicle along and over such crossing.
Vincennes Traction Co. v. Curry, 683, 690 (5).
5. *Operation.—Drivers of Vehicles.—Respective Rights and Duties.*
—The rights of the driver of a vehicle on the street and that of a street railway company are equal, and each is bound to use ordinary care to avoid a collision.
Louisville, etc., Traction Co. v. Lottich, 426, 431 (5).
6. *Operation.—Presumption as to Speed.*—The plaintiff, in attempting to drive across defendant's street car track had a right to

STREET RAILROADS—Continued.

- assume that defendant's car would not be operated at an unlawful rate of speed, in the absence of any knowledge or warning to the contrary. *Louisville, etc., Traction Co. v. Lottich*, 426, 432 (7).
7. *Personal Injuries.—Contributory Negligence.—Determination.—Acts or Omissions of Company.*—The failure of a street car company in operating its cars to discharge the duty it owes to travelers rightfully on the streets is often an important element to be considered in determining the question of contributory negligence. *Louisville, etc., Traction Co. v. Lottich*, 426, 433 (8).
8. *Personal Injuries.—Contributory Negligence.—Jury Question.*—Where plaintiff, who was injured by defendant's street car, used some care when he undertook to cross defendant's tracks, it was a question of fact for the jury to determine whether such care was ordinary care under all the facts shown by the evidence. *Louisville, etc., Traction Co. v. Lottich*, 426, 431 (6).
9. *Personal Injuries.—Jury Question.—Contributory Negligence.*—Where, in an action for injuries in being struck by a street car, the facts and conditions established were such as to warrant the drawing of different inferences by reasonable minds upon the question of contributory negligence, the question is one of fact for the jury to determine. *Louisville, etc., Traction Co. v. Lottich*, 426, 433 (9).
10. *Personal Injuries.—Verdict.—Answers to Interrogatories.*—In an action against a street car company for injuries to a traveler upon the street, where the negligence charged was in the operation of the car at an unlawful speed so as to strike plaintiff's wagon as he was crossing the track, and the collision occurred after sunset, the general verdict for plaintiff is not overcome by answers to interrogatories showing that the track was in the center of a wide street, that at that point a car might be seen a distance of three blocks away, and that there were no obstructions to plaintiff's view, that plaintiff was experienced, and had good sight and hearing, and that the car could not have been stopped after he started to cross, etc., since under the issues evidence was admissible to show that it was too dark for plaintiff to see the car, that on account of noises he could not hear its approach, etc. *Louisville, etc., Traction Co. v. Lottich*, 426, 431 (4), 433 (4).

SUPERVISOR—

The duty of a, to keep highways in good repair is a public duty, imperative and not discretionary, and he may be compelled by mandate to perform such duty, see **HIGHWAYS 3**.

SURETY—

Discharge of, see **GUARDIAN AND WARD 2, 3**.

TAXATION—

1. *Tax Sales.—Rights of Purchaser.*—A tax sale of personal property must be pursuant to the statutory provisions therefor or it is illegal and void and the purchaser acquires no title to the property sold. *Johnson v. Sidey*, 678, 682 (3).
2. *Tax Sales.—Rights of Purchaser.*—Real estate delinquent for taxes must be sold in the manner prescribed by statute, or the purchaser can acquire no title thereto, but merely the right to the lien which the State had. *Johnson v. Sidey*, 678, 682 (2).

TENANTS IN COMMON—

See SPECIFIC PERFORMANCE 2.

TENDER—

See SPECIFIC PERFORMANCE 1.

TIME—

Extension of, for filing of briefs, see APPEAL 64.

Extension of, for filing bill of exceptions, see APPEAL 23.

Of sunset, see EVIDENCE 1.

TITLE—

Merger of legal and equitable, see MORTGAGES 7.

TOWNSHIP AID—

Expense of election for, see RAILROADS 45.

TOWNSHIP TRUSTEE—

Duty of, see SCHOOLS AND SCHOOL DISTRICTS 4.

Is the superior officer in the township and the supervisor must carry out his orders with reference to highways when specifically given, see HIGHWAYS 4.

TRACKS—

Children on, see RAILROADS 1-3.

Injuries to animals on, see RAILROADS 28-32.

Injuries to children on, see RAILROADS 33-35.

Injuries to persons on, see RAILROADS 36.

TRAVELER—

Rights and duties of, see MUNICIPAL CORPORATIONS 2.

TRIAL.

I. COURSE AND CONDUCT OF TRIAL IN GENERAL, 1, 2.	IV. VERDICT, 5-9.
II. RECEPTION OF EVIDENCE, 3.	V. ANSWERS TO INTERROGATORIES, 10.
III. INSTRUCTIONS, 4.	VI. FINDINGS, 11.

I. COURSE AND CONDUCT OF TRIAL IN GENERAL.

1. *Issues.—Delivery of Letter.—Question for Court or Jury.*—That a letter properly addressed and stamped was mailed makes a *prima facie* case of delivery in due course of mail, which, if denied, presents a question of fact for determination by the court or jury trying the cause.

National, etc., Ins. Co. v. Wolfe, 418, 424 (7).

2. *Excessive Verdict.—Directing Remittitur.*—In an action for damages where the jury has returned an excessive verdict and there is no dispute as to what the amount should be, the liability being fixed, the trial court may direct a remittitur, and such action will not be deemed an invasion of the province of the jury, but will be upheld on the theory that the excess arose either from

TRIAL—Continued.

an error of law or mistake in computation, or from a misapprehension of the facts, and that the error does not permeate the entire verdict.

Blair Baker Horse Co. v. Railroad Transfer Co., 505, 511 (5).

II. RECEPTION OF EVIDENCE.

3. *Inferences from Facts Proved.—Evidence.—Sufficiency.*—It is not essential that a fact be proved by direct or positive evidence, since the court or jury may draw any reasonable inference of fact from the evidence, and it is sufficient if the inference may reasonably be drawn from the facts and circumstances which the evidence tends to establish.

Bronnenberg v. Indiana Union Traction Co., 495, 498 (1).

III. INSTRUCTIONS.

See APPEAL 72, 122-126; CONTRACTS 4; DAMAGES 3; ELECTRICITY 2; INSURANCE 8, 12; MASTER AND SERVANT 24, 26, 27; MUNICIPAL CORPORATIONS 4; NEGLIGENCE 23, 27; RAILROADS 24, 25; SALES; STREET RAILROADS 1, 2.

Refusal of, see APPEAL 85-90.

Review as to, see APPEAL 73-91.

Waiver of error in, see APPEAL 131.

Refusing of peremptory, can not be presented by independent assignment of error, but is ground for a new trial, see APPEAL 22.

4. *Duty of Court and Jury.*—The court's instructions should state the law clearly and the language should be free from doubt and ambiguities so that the jury may be aided in applying the law to the facts, and it is the duty of the jury to accept and apply the law as stated by the court to the facts which it is the duty of the jury to find.

Blair Baker Horse Co. v. Railroad Transfer Co., 505, 512 (7).

IV. VERDICT.

See APPEAL 69, 70, 100-107; DEATH 4; MASTER AND SERVANT 4-6; NEGLIGENCE 12, 21, 26; STREET RAILROADS 10.

5. *Scope.*—A general verdict necessarily includes a finding on all material issues involved. *W. McMillen & Son v. Hall*, 545, 560 (13).
6. *Excessiveness.—Contrary to Law.*—A verdict for an amount in excess of that which may be legally recovered is not contrary to law where a remittitur of the excess may be directed.

Blair Baker Horse Co. v. Railroad Transfer Co., 505, 511 (4).

7. *Answers to Interrogatories.*—A general verdict is not overcome by the jury's answers to interrogatories, nor by isolated facts shown therein, unless such answers or such isolated facts are in irreconcilable conflict with such verdict.

City of Gary v. Getzel, 565, 569 (1).

8. *Answers to Interrogatories.—Motion for Judgment.*—Where a cause goes to trial on two paragraphs of complaint, a motion for judgment on answers by the jury to interrogatories is properly overruled if the answers are consistent with the verdict on either paragraph.

W. McMillen & Son v. Hall, 545, 558 (9).

9. *Answers to Interrogatories.*—Every reasonable presumption is indulged in favor of a general verdict as against a motion for

TRIAL—Continued.

judgment on the jury's answers to interrogatories, and the latter can only prevail when the answers are in irreconcilable conflict with the verdict, and to constitute such conflict it must be such as is impossible of removal by any possible evidence properly admissible under the issues.

Louisville, etc., Traction Co. v. Lottich, 426, 430 (2).

V. ANSWERS TO INTERROGATORIES.

See **APPEAL** 104, 118; **MASTER AND SERVANT** 1-6; **NEGLIGENCE** 12, 21, 22; **RAILROADS** 14, 17, 18, 36; **STREET RAILROADS** 10.

Ruling on motion for judgment on, see **APPEAL** 10.

10. *Conflicting Answers*.—Conflicting answers to interrogatories submitted to the jury nullify each other and have no controlling influence against the verdict.

Lutz v. Cleveland, etc., R. Co., 16, 23 (2).

VI. FINDINGS.

See **APPEAL** 108-117; **INJUNCTION** 1; **VENDOR AND PURCHASER**.

11. *Verdict*.—*Venire de Novo*.—The rule, where the facts are specially found, that all issues and material facts not found will be adjudged against the party who had the burden of proving them, so as to defeat a motion for *venire de novo* on the ground of a failure to find some material fact, or a failure to find for or against some of the defendants, has no application in cases where the facts are not specially found, so that in the latter instance a verdict that is not a finding on all the issues to be tried is defective, and subject to a motion for a *venire de novo*.

Smith v. Graves, 55, 60 (6).

TRUSTS—

Secret, see **CHATTEL MORTGAGES** 7.

"VALUE RECEIVED"—

See **WORDS AND PHRASES**.

VEHICLES—

Drivers of, see **STREET RAILROADS** 5.

VENDOR AND PURCHASER—

Knowledge of Prior Contract.—*Evidence*.—*Finding*.—*Conclusiveness*.—Where there was evidence that the purchasers of land had admitted that they had heard rumors of its purchase by plaintiffs, which was met by the testimony of such purchasers denying that they had actual knowledge, the jury had a right to infer that they had no actual knowledge, notwithstanding it further appeared that such purchasers learned from their abstract that an unacknowledged contract of sale to plaintiffs had been entered in the records of the county, and the finding is conclusive.

Bledsoe v. Ross, 609, 612 (2).

VENIRE DE NOVO—

See **TRIAL** 11.

VENUE—

1. *Change of Venue.—Statutes.*—The statutory provision for a change of venue in a civil cause upon proper application therefor is imperative, and a denial of a change of venue under such circumstances is reversible error. *McClain v. Steele*, 657, 659 (1).
2. *Refusal of Change.—Presenting Question on Appeal.*—In order to predicate error on the ruling on an application for a change of venue, the same must be properly assigned as a ground in the motion for a new trial. *McClain v. Steele*, 657, 660 (2).

VERDICT—

See TRIAL.

VOIR DIRE EXAMINATION—

Great latitude is granted in the, of jurors touching their qualifications, see JULY 4.

WAGES—

Recovery of, applied to dues in a relief association, see RAILROADS 40.

WAIVER—

See APPEAL 36, 37, 39, 40; INSURANCE 19, 22, 28.

Error waived, see APPEAL 130, 131.

Of error, see APPEAL 47-49, 56.

WARRANTY—

Action for breach of, see SALES.

In application, see INSURANCE 23-25.

WATERS AND WATERCOURSES—

Surface Waters.—Damage to Fee.—Complaint.—In an action for injunction and for damages from the flow of surface water, a complaint alleging injury by washing and digging out a ditch and by washing and digging out the land shows a permanent injury to the fee, and is sufficient to entitle plaintiff to damages for injury to the fee of his lands. *Vandalia R. Co. v. House*, 10, 12 (3).

WIFE—

Rights of debtor's, see ATTACHMENT 3.

WILLS—

1. *Construction.*—In the absence of a clear expression of an intention to the contrary it will be presumed that words used in a will were used in the light of the settled meaning which the law attaches thereto. *Smith v. Smith*, 169, 173 (4).
2. *Construction.*—A will must be construed as a whole and effect must be given to each particular clause thereof, unless some parts are conflicting and portions are against the manifest intention of the testator. *Nagle v. Hirsch*, 282, 285 (1).
3. *Construction.—Intent of Testator.*—Where the language of a will is plain, there is no room for construction and the courts

WILLS—Continued.

will give effect to the testator's intention as therein expressed, if such intention is not contrary to law.

Smith v. Smith, 169, 173 (3).

4. *Construction.—Words of Postponement.*—It will be presumed that words postponing an estate relate to the beginning of the enjoyment of the remainder, unless the language clearly shows that they were intended to relate to the vesting of the estate.

Smith v. Smith, 169, 174 (6).

5. *Construction.—Words of Limitation.—Restraint of Marriage.*—Under a devise to testator's wife of the use of all of testator's real estate "for her maintenance and support during life while she remains unmarried", the use of the words "while she remains unmarried", is not in restraint of marriage and is not controlled by §3123 Burns 1914, §2567 R. S. 1881.

Nagle v. Hirsch, 282, 286 (3).

6. *Construction.—Vesting of Estates.—Words of Survivorship.*—The law favors the vesting of estates at the earliest possible moment, so that words of survivorship in a will are construed as referring to the death of the testator, in the absence of language clearly showing that they refer to a subsequent date or event.

Smith v. Smith, 169, 173 (5).

7. *Construction.—Estate Devise.—Limited Life Estate.—Disposition of Remainder.*—A devise to testator's wife "for her maintenance and support during her life while she remains unmarried the use of all real estate owned by me at the time of my death", gave to her a limited life estate determinable before death only by the event of her remarriage, and the effect of the foregoing provision was not modified or changed by a subsequent clause in the devise that "all the real estate is to be divided equally between my son and daughter * * * after the death of my wife"; but the devise as a whole shows that it was the testator's intention to give the real estate to his children upon the death of his wife while his widow, or upon her remarriage; hence, on the election of the widow to take under the will, title vested in testator's children subject to her right to the use and enjoyment during widowhood, whether terminated by death or remarriage.

Nagle v. Hirsch, 282, 285 (2), 287 (2).

8. *Construction.—Devise of Life Estate.—Vesting of Remainder.*—Under a will devising certain real estate to testator's daughter for life and providing that "at her death the same is to descend and vest share and share alike in equal proportions to her children living at the time of her death", and making similar devises to testator's other children, and providing that "if at the time of the death of either of my children * * * such child of mine shall not have a child then living the land herein devised to such child of mine shall in that case vest in equal proportions share and share alike in the grandchildren of such child of mine as may die without living children and in such case if there is no grandchildren of such child of mine as may die without living children the tracts of land herein devised to such child of mine shall by my executor be sold", and providing that the proceeds of such sale be divided equally among testator's grandchildren, etc., the estate in remainder in the land devised to such daughter vested in her children upon testator's death, so that on the death of one of her children subsequent to the death of testator the interest of such child descended to his legal heirs.

Smith v. Smith, 169, 171 (2), 174 (2).

WILLS—Continued.

9. *Election by Widow.—Effect.*—A widow's election to take under the will of her deceased husband is a relinquishment of all claims to testator's real estate other than that devised to her by the will. *Nagle v. Hirsch*, 282, 287 (4).

WORDS AND PHRASES—

"Grant", implies a conveyance in writing, see RAILROADS 50.

"Highways", as used in the statute is in a restrictive sense, see ELECTRICITY 3.

An "immediate cause" is not necessarily the proximate cause, see MASTER AND SERVANT 3.

"Or", use of word, see MASTER AND SERVANT 30.

"Railroad", as used in the statute is in a restrictive sense, see ELECTRICITY 3.

"Roads", as used in the statute is in a restrictive sense, see ELECTRICITY 3.

"Value received", not necessary to the negotiability of a note, unless required by statute, see BILLS AND NOTES 5.

WRITTEN INSTRUMENTS—

Admissibility of evidence of contents of, see EVIDENCE 4.



